UNITED STATES REPORTS

VOLUME 431

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1976

OPINIONS OF APRIL 27 (CONCLUDED) THROUGH (IN PART) JUNE 13, 1977
ORDERS OF APRIL 28 THROUGH JUNE 13, 1977

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.*

OFFICERS OF THE COURT

GRIFFIN B. BELL, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
ALFRED WONG, Marshal.
BETTY J. CLOWERS, Acting Librarian.

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*Mr. Justice Clark, who retired effective June 12, 1967 (389 U. S. IV), died on June 13, 1977.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1976

UNITED STATES TRUST COMPANY OF NEW YORK, TRUSTEE *v.* NEW JERSEY ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

No. 75–1687. Argued November 10, 1976—Decided April 27, 1977

A 1962 statutory covenant between New Jersey and New York limited the ability of the Port Authority of New York and New Jersey to subsidize rail passenger transportation from revenues and reserves pledged as security for consolidated bonds issued by the Port Authority. A 1974 New Jersey statute, together with a concurrent and parallel New York statute, retroactively repealed the 1962 covenant. Appellant, both as a trustee for, and as a holder of, Port Authority bonds, brought suit in the New Jersey Superior Court for declaratory relief, claiming that the 1974 New Jersey statute impaired the obligation of the States' contract with the bondholders in violation of the Contract Clause of the United States Constitution. The Superior Court dismissed the complaint after trial, holding that the statutory repeal was a reasonable exercise of New Jersey's police power and was not prohibited by the Contract Clause. The New Jersey Supreme Court affirmed. *Held:* The Contract Clause prohibits the retroactive repeal of the 1962 covenant. Pp. 14–32.

(a) The outright repeal of the 1962 covenant totally eliminated an important security provision for the bondholders and thus impaired the obligation of the States' contract. Pp. 17–21.

(b) The security provision of the 1962 covenant was purely a financial

obligation and thus not necessarily a compromise of the States' reserved powers that cannot be contracted away. Pp. 21–25.

(c) The repeal of the 1962 covenant cannot be sustained on the basis of *Faitoute Iron & Steel Co.* v. *City of Asbury Park*, 316 U. S. 502, and *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56, simply because the bondholders' rights were not totally destroyed. Pp. 26–28.

(d) An impairment of contract such as is involved in this case can only be upheld if it is both reasonable and necessary to serve an important public purpose, but here the impairment was neither necessary to achieve the States' plan to encourage private automobile users to shift to public transportation nor reasonable in light of changed circumstances. Total repeal of the 1962 covenant was not essential, since the States' plan could have been implemented with a less drastic modification of the covenant, and since, without modifying the covenant at all, the States could have adopted alternative means of achieving their twin goals of discouraging automobile use and improving mass transit. Nor can the repeal be claimed to be reasonable on the basis of the need for mass transportation, energy conservation, and environmental protection, since the 1962 covenant was adopted with knowledge of such concerns. Pp. 28–32.

69 N. J. 253, 353 A. 2d 514, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and REHNQUIST and STEVENS, JJ., joined. BURGER, C. J., filed a concurring statement, *post*, p. 32. BRENNAN, J., filed a dissenting opinion, in which WHITE and MARSHALL, JJ., joined, *post*, p. 33. STEWART, J., took no part in the decision of the case. POWELL, J., took no part in the consideration or decision of the case.

Devereux Milburn argued the cause for appellant. With him on the briefs were *Robert A. McTamaney* and *Robert B. Meyner*.

William F. Hyland, Attorney General of New Jersey, *pro se*, argued the cause for appellees. With him on the brief were *Michael I. Sovern* and *Murray J. Laulicht*.*

**Louis J. Lefkowitz*, Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Daniel M. Cohen*, Assistant Attorney General, filed a brief for the State of New York as *amicus curiae* urging affirmance.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents a challenge to a New Jersey statute, 1974 N. J. Laws, c. 25, as violative of the Contract Clause [1] of the United States Constitution. That statute, together with a concurrent and parallel New York statute, 1974 N. Y. Laws, c. 993, repealed a statutory covenant made by the two States in 1962 that had limited the ability of The Port Authority of New York and New Jersey [2] to subsidize rail passenger transportation from revenues and reserves.

The suit, one for declaratory relief, was instituted by appellant United States Trust Company of New York in the Superior Court of New Jersey, Law Division, Bergen County. Named as defendants were the State of New Jersey, its Governor, and its Attorney General. Plaintiff-appellant sued as trustee for two series of Port Authority Consolidated Bonds, as a holder of Port Authority Consolidated Bonds, and on behalf of all holders of such bonds.[3]

After a trial, the Superior Court ruled that the statutory repeal was a reasonable exercise of New Jersey's police power, and declared that it was not prohibited by the Contract Clause or by its counterpart in the New Jersey Constitution, Art. IV, § 7, ¶ 3. Accordingly, appellant's complaint was dismissed. 134 N. J. Super. 124, 338 A. 2d 833 (1975). The Supreme Court of New Jersey, on direct appeal and by *per*

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[1] "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U. S. Const., Art. I, § 10, cl. 1.

[2] The name originally was "The Port of New York Authority." 1921 N. J. Laws, c. 151, p. 416; 1921 N. Y. Laws, c. 154, p. 496. It was changed to "The Port Authority of New York and New Jersey," effective July 1, 1972. 1972 N. J. Laws, c. 69; 1972 N. Y. Laws, c. 531.

[3] Appellant is trustee for the Fortieth and Forty-first Series of Port Authority Consolidated Bonds, with an aggregate principal amount of $200 million. At the time the complaint was filed, appellant also held approximately $96 million of Consolidated Bonds in its own account, as custodian, and as fiduciary in several capacities. There were then over $1,600 million of Consolidated Bonds outstanding.

curiam opinion, affirmed "substantially for the reasons set forth in the [trial court's] opinion." 69 N. J. 253, 256, 353 A. 2d 514, 515 (1976). We noted probable jurisdiction. 427 U. S. 903 (1976).[4]

I

BACKGROUND

A. *Establishment of the Port Authority.* The Port Authority was established in 1921 by a bistate compact to effectuate "a better co-ordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York." 1921 N. J. Laws, c. 151, p. 413; 1921 N. Y. Laws, c. 154, p. 493. See N. J. Stat. Ann. § 32:1–1 *et seq.* (1940); N. Y. Unconsol. Laws § 6401 *et seq.* (McKinney 1961). The compact, as the Constitution requires, Art. I, § 10, cl. 3, received congressional consent. 42 Stat. 174.

The compact granted the Port Authority enumerated powers and, by its Art. III, "such other and additional powers as shall be conferred upon it by the Legislature of either State concurred in by the Legislature of the other, or by Act or Acts of Congress." The powers are enumerated in Art. VI. Among them is "full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within said district." "Transportation facility" is defined, in Art. XXII, to include "railroads, steam or electric, . . . for use for the transportation or carriage of persons or property."

The Port Authority was conceived as a financially independent entity, with funds primarily derived from private investors. The preamble to the compact speaks of the "encouragement of

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[4] The State of New York is not a party to this case, although its Attorney General has filed a brief as *amicus curiae*. A challenge to the parallel New York statute has been pending in the Supreme Court of New York, County of New York, since 1974. *United States Trust Co. of New York* v. *New York*, No. 09128/74.

the investment of capital," and the Port Authority was given power to mortgage its facilities and to pledge its revenues to secure the payment of bonds issued to private investors.[5]

See generally E. Bard, The Port of New York Authority (1942).

B. *Initial Policy Regarding Mass Transit.* Soon after the Port Authority's inception, the two States, again with the consent of Congress, 42 Stat. 822, agreed upon a comprehensive plan for the entity's development. 1922 N. J. Laws, c. 9; 1922 N. Y. Laws, c. 43. This plan was concerned primarily, if not solely, with transportation of freight by carriers and not with the movement of passengers in the Port Authority district. The plan, however, was not implemented.[6] The New

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[5] The Port Authority possessed no taxing power and was unable to pledge the credit of either State. The trial court found:

"Under the terms of the Compact the power to levy taxes or to pledge the credit of either state was expressly withheld from the Authority. From its inception, with the exception of monies advanced as loans by the states, the Authority was required to finance its facilities solely with money borrowed from the public and to be repaid out of the revenues derived from its operations. By reason of these financial limitations two concepts initially emerged which have played an important role in the realization of the purposes for which the Authority was created: first, the specific projects undertaken by the Authority should be self-supporting, *i. e.*, the revenues of each should be sufficient to cover its operating expenses and debt service requirements; and second, since the Authority is a public agency over which its creditors have no direct control, the bondholders should be protected by covenants with the Authority and with the states which have ultimate control over its operations." 134 N. J. Super. 124, 139–140, 338 A. 2d 833, 841 (1975).

The two States subsequently took steps to protect the Port Authority's financial integrity. See, for example, the 1925 statutory declarations not to authorize the construction of competitive bridges within the district or to limit the right of the Port Authority to levy such charges and tolls as it deemed necessary to produce revenues to fund its bonds. 1925 N. J. Laws, c. 37, § 5; 1925 N. Y. Laws, c. 210, § 5.

[6] The parties are not in agreement as to the original perception of the compact and the plan. The appellant claims that the Port Authority

Jersey Legislature at that time declared that the plan "does not include the problem of passenger traffic," even though that problem "should be considered in co-operation with the port development commission." 1922 Laws, c. 104. The Port Authority itself recognized the existence of the passenger service problem. 1924 Annual Report 23; 1928 Annual Report 64–66; App. 574a–575a.

In 1927 the New Jersey Legislature, in an Act approved by the Governor, directed the Port Authority to make plans "supplementary to or amendatory of the comprehensive plan . . . as will provide adequate interstate and suburban transportation facilities for passengers." 1927 Laws, c. 277. The New York Legislature followed suit in 1928, but its bill encountered executive veto.[7] The trial court observed that this veto "to all intents and purposes ended any legislative effort to involve the Port Authority in an active role in commuter transit for the next 30 years." 134 N. J. Super., at 149, 338 A. 2d, at 846.

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was organized "as a freight coordinating agency," Brief for Appellant 5, whereas the appellees challenge that description and emphasize the presence of a mass transit problem as a factor of profound concern in the Port Authority's development. Brief for Appellees 2–5. The trial court found that neither the commission which recommended the creation of the Port Authority nor the comprehensive plan contemplated responsibility of the agency for passenger transit. 134 N. J. Super., at 134–139, 338 A. 2d, at 838–841.

[7] Governor Alfred E. Smith in his statement in support of his veto said:

"[I]t has been a great disappointment to me to find that the opposition of the railroads has prevented to date the making of real progress in working out the program of freight distribution in the port which always has been the main object and purpose of the Port of New York Authority. I am satisfied that the Port Authority should stick to this program and I am entirely unwilling to give my approval to any measure which at the expense of the solution of the great freight distribution problem will set the Port Authority off on an entirely new line of problem connected with the solution of the suburban passenger problem." App. 573a–574a.

C. *Port Authority Fiscal Policy.* Four bridges for motor vehicles were constructed by the Port Authority. A separate series of revenue bonds was issued for each bridge. Revenue initially was below expectations, but the bridges ultimately accounted for much of the Port Authority's financial strength. The legislatures transferred the operation and revenues of the successful Holland Tunnel to the Port Authority, and this more than made up for the early bridge deficits.

The States in 1931 also enacted statutes creating the general reserve fund of the Port Authority. 1931 N. J. Laws, c. 5; 1931 N. Y. Laws, c. 48. Surplus revenues from all Port Authority facilities were to be pooled in the fund to create an irrevocably pledged reserve equal to one-tenth of the par value of the Port Authority's outstanding bonds. This level was attained 15 years later, in 1946.

In 1952, the Port Authority abandoned the practice of earmarking specific facility revenues as security for bonds of that facility. The Port Authority's Consolidated Bond Resolution established the present method of financing its activities; under this method its bonds are secured by a pledge of the general reserve fund.[8]

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[8] The appellees state that the creation of the general reserve fund "made the Port Authority's fiscal strength possible." Brief for Appellees 6 n. 7.

The parties, however, are in disagreement as to the actual and proper fiscal policy of the Port Authority. Appellant claims that each facility should have prospects of producing sufficient revenue to support itself. Appellees' position is apparent from their assertion that although the self-supporting-facility concept may have "initially emerged," as the trial court stated, 134 N. J. Super., at 140, 338 A. 2d, at 841, "the concept had no practical significance because it was not attained prior to 1931 and was unnecessary after 1931," with the establishment of the general reserve fund. Brief for Appellees 7.

The trial court observed that upon the adoption of the Consolidated Bonds Resolution in 1952, the self-supporting-facility concept "ceased to have the significance previously attached to it." 134 N. J. Super., at 143, 338 A. 2d, at 843.

D. *Renewed Interest in Mass Transit.* Meanwhile, the two States struggled with the passenger transportation problem. Many studies were made. The situation was recognized as critical, great costs were envisioned, and substantial deficits were predicted for any mass transit operation. The Port Authority itself financed a study conducted by the Metropolitan Rapid Transit Commission which the States had established in 1954.

In 1958, Assembly Bill No. 16 was introduced in the New Jersey Legislature. This would have had the Port Authority take over, improve, and operate interstate rail mass transit between New Jersey and New York. The bill was opposed vigorously by the Port Authority on legal and financial grounds. The Port Authority also retaliated, in a sense, by including a new safeguard in its contracts with bondholders. This prohibited the issuance of any bonds, secured by the general reserve fund, for a new facility unless the Port Authority first certified that the issuance of the bonds would not "materially impair the sound credit standing" of the Port Authority. App. 812a. Bill No. 16 was not passed.

In 1959, the two States, with the consent of Congress, Pub. L. 86–302, 73 Stat. 575, created the New York-New Jersey Transportation Agency to deal "with matters affecting public mass transit within and between the 2 States." 1959 N. J. Laws, c. 13, § 3.1, as amended by c. 24; 1959 N. Y. Laws, c. 420, § 3.1.

Also in 1959, the two States enacted legislation providing that upon either State's election the Port Authority would be authorized to purchase and own railroad passenger cars for the purpose of leasing them to commuter railroads. 1959 N. J. Laws, c. 25; 1959 N. Y. Laws, c. 638. Bonds issued for this purpose would be guaranteed by the electing State. New York so elected, N. Y. Const., Art. X, § 7, effective January 1, 1962, and approximately $100 million of Commuter Car Bonds were issued by the Port Authority to purchase about

500 air-conditioned passenger cars and eight locomotives used on the Penn Central and Long Island Railroads.

E. *The 1962 Statutory Covenant.* In 1960 the takeover of the Hudson & Manhattan Railroad by the Port Authority was proposed. This was a privately owned interstate electric commuter system then linking Manhattan, Newark, and Hoboken through the Hudson tubes. It had been in reorganization for many years, and in 1959 the Bankruptcy Court and the United States District Court had approved a plan that left it with cash sufficient to continue operations for two years but with no funds for capital expenditures. *In re Hudson & Manhattan R. Co.*, 174 F. Supp. 148 (SDNY 1959), aff'd *sub nom. Spitzer* v. *Stichman*, 278 F. 2d 402 (CA2 1960). A special committee of the New Jersey Senate was formed to determine whether the Port Authority was "fulfilling its statutory duties and obligations," App. 605a. The committee concluded that the solution to bondholder concern was "[l]imiting by a constitutionally protected statutory covenant with Port Authority bondholders the extent to which the Port Authority revenues and reserves pledged to such bondholders can in the future be applied to the deficits of possible future Port Authority passenger railroad facilities beyond the original Hudson & Manhattan Railroad system." *Id.*, at 656a. And the trial court found that the 1962 New Jersey Legislature "concluded it was necessary to place a limitation on mass transit deficit operations to be undertaken by the Authority in the future so as to promote continued investor confidence in the Authority." 134 N. J. Super., at 178, 338 A. 2d, at 863–864.

The statutory covenant of 1962 was the result. The covenant itself was part of the bistate legislation authorizing the Port Authority to acquire, construct, and operate the Hudson & Manhattan Railroad and the World Trade Center. The statute in relevant part read:

"The 2 States covenant and agree with each other and

with the holders of any affected bonds, as hereinafter defined, that so long as any of such bonds remain outstanding and unpaid and the holders thereof shall not have given their consent as provided in their contract with the port authority, (a) . . . and (b) neither the States nor the port authority nor any subsidiary corporation incorporated for any of the purposes of this act will apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad purposes whatsoever other than permitted purposes hereinafter set forth." 1962 N. J. Laws, c. 8, § 6; 1962 N. Y. Laws, c. 209, § 6.[9]

The "permitted purposes" were defined to include (i) the Hudson & Manhattan as then existing, (ii) railroad freight facilities, (iii) tracks and related facilities on Port Authority vehicular bridges, and (iv) a passenger railroad facility if the Port Authority certified that it was "self-supporting" or, if not, that at the end of the preceding calendar year the general reserve fund contained the prescribed statutory amount, and that all the Port Authority's passenger revenues, including the Hudson & Manhattan, would not produce deficits in excess of "permitted deficits."

A passenger railroad would be deemed "self-supporting" if the amount estimated by the Authority as average annual net income equaled or exceeded the average annual debt service for the following decade. Though the covenant was not explicit on the point, the States, the Port Authority, and its bond counsel have agreed that any state subsidy might be included in the computation of average annual net income of the facility.

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[9] Not at issue in the instant case is part (a) of § 6 of the statutory covenant (omitted in the quoted material in the text), which promises

"Permitted deficits," the alternative method under permitted purpose (iv), was defined to mean that the annual estimated deficit, including debt service, of the Hudson tubes and any additional non-self-sustaining railroad facility could not exceed one-tenth of the general reserve fund, or 1% of the Port Authority's total bonded debt.

The terms of the covenant were self-evident. Within its conditions the covenant permitted, and perhaps even contemplated, additional Port Authority involvement in deficit rail mass transit as its financial position strengthened, since the limitation of the covenant was linked to, and would expand with, the general reserve fund.

A constitutional attack on the legislation containing the covenant was promptly launched. New Jersey and New York joined in the defense. The attack proved unsuccessful. *Courtesy Sandwich Shop, Inc.* v. *Port of New York Authority*, 12 N. Y. 2d 379, 190 N. E. 2d 402, appeal dismissed, 375 U. S. 78 (1963). See *Kheel* v. *Port of New York Authority*, 331 F. Supp. 118 (SDNY 1971), aff'd, 457 F. 2d 46 (CA2), cert. denied, 409 U. S. 983 (1972).

With the legislation embracing the covenant thus effective, the Port Authority on September 1, 1962, assumed the ownership and operating responsibilities of the Hudson & Manhattan through a wholly owned subsidiary, Port Authority Trans-Hudson Corporation (PATH). Funds necessary for this were realized by the successful sale of bonds to private investors accompanied by the certification required by § 7 of the Consolidated Bond Resolution that the operation would not materially impair the credit standing of the Port Authority, the investment status of the Consolidated Bonds, or the ability of the Port Authority to fulfill its commitments to bondholders. This § 7 certification was based on a projection

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that the States will not impair the Port Authority's control over its fees or services. This provision has not been repealed, even prospectively.

that the annual net loss of the PATH system would level off at about $6.6 million from 1969 to 1991. At the time the certification was made the general reserve fund contained $69 million, and thus the projected PATH deficit was close to the level of "permitted deficits" under the 1962 covenant. 134 N. J. Super., at 163, and n. 27, 338 A. 2d, at 855, and n. 27.

The PATH fare in 1962 was 30 cents and has remained at that figure despite recommendations for increase. App. 684a–686a. As a result of the continuation of the low fare, PATH deficits have far exceeded the initial projection. Thus, although the general reserve fund had grown to $173 million by 1973, substantially increasing the level of permitted deficits to about $17 million, the PATH deficit had grown to $24.9 million. In accordance with a stipulation of the parties, *id.*, at 682a–683a, the trial court found that the PATH deficit so exceeded the covenant's level of permitted deficits that the Port Authority was unable to issue bonds for any new passenger railroad facility that was not self-supporting. 134 N. J. Super., at 163 n. 26, 338 A. 2d, at 855 n. 26.[10]

F. *Prospective Repeal of the Covenant.* Governor Cahill of New Jersey and Governor Rockefeller of New York in April 1970 jointly sought increased Port Authority participation in mass transit. In November 1972 they agreed upon a

[10] Notwithstanding the "permitted deficits" formula, the covenant permits use of Port Authority revenues for mass transit if 60% of the bondholders give their consent. The procedures for obtaining such consent are provided in § 16 (b) of the Consolidated Bond Resolution. App. 802a–809a. The Port Authority commissioned a study by First Boston Corporation in 1971 that proposed placing a surcharge on bridge and tunnel tolls, with the extra revenues going to a special fund to secure bonds for mass transportation projects. This proposal would not have diminished the historic reserves pledged to secure the bonds. The study concluded, however, that some increase in the interest rates of existing bonds would have been necessary to obtain a favorable vote of the bondholders. *Id.*, at 696a–699a. There is some evidence in the record that such a proposal could not win bondholder approval, partly because the requisite procedures are unwieldy. *Id.*, at 191a–192a.

plan for expansion of the PATH system. This included the initiation of direct rail service to Kennedy Airport and the construction of a line to Plainfield, N. J., by way of Newark Airport. The plan anticipated a Port Authority investment of something less than $300 million out of a projected total cost of $650 million, with the difference to be supplied by federal and state grants. It also proposed to make the covenant inapplicable with respect to bonds issued *after* the legislation went into effect. This program was enacted, effective May 10, 1973, and the 1962 covenant was thereby rendered inapplicable, or in effect repealed, with respect to bonds issued subsequent to the effective date of the new legislation. 1972 N. J. Laws, c. 208; 1972 N. Y. Laws, c. 1003, as amended by 1973 N. Y. Laws, c. 318.[11]

G. *Retroactive Repeal of the Covenant.* It soon developed that the proposed PATH expansion would not take place as contemplated in the Governors' 1972 plan. New Jersey was unwilling to increase its financial commitment in response to a sharp increase in the projected cost of constructing the Plainfield extension. As a result the anticipated federal grant was not approved. App. 717a.

New Jersey had previously prevented outright repeal of the 1962 covenant, but its attitude changed with the election of a new Governor in 1973. In early 1974, when bills were pending in the two States' legislatures to repeal the covenant

[11] The introductory statement appended to the New Jersey bill recited: "The bill is also designed to preclude the application of the 1962 covenant to holders of bonds newly issued after the effective date of this act, while maintaining in status quo the rights of the holders of the bonds issued after March 27, 1962 (the effective date of the 1962 covenant legislation) but prior to the effective date of this act." *Id.*, at 707a.

Earlier in 1972 the New York Legislature had enacted, and the Governor had signed, a bill repealing the 1962 covenant in its entirety. 1972 N. Y. Laws, c. 1003. New Jersey did not adopt the necessary complementary legislation at that time. The 1973 amendment to the New York legislation, noted in the text, was then enacted to conform to the New Jersey statute.

retroactively, a national energy crisis was developing. On November 27, 1973, Congress had enacted the Emergency Petroleum Allocation Act, 87 Stat. 627, as amended, 15 U. S. C. § 751 *et seq.* (1970 ed., Supp. V). In that Act Congress found that the hardships caused by the oil shortage "jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare." 87 Stat. 628, 15 U. S. C. § 751 (a)(3). This time, proposals for retroactive repeal of the 1962 covenant were passed by the legislature and signed by the Governor of each State. 1974 N. J. Laws, c. 25; 1974 N. Y. Laws, c. 993.[12]

On April 10, 1975, the Port Authority announced an increase in its basic bridge and tunnel tolls designed to raise an estimated $40 million annually. App. 405a–407a, 419a–421a, 528a. This went into effect May 5 and was, it was said, "[t]o increase [the Port Authority's] ability to finance vital mass transit improvements." *Id.*, at 405a.

II

At the time the Constitution was adopted, and for nearly a century thereafter, the Contract Clause was one of the few express limitations on state power. The many decisions of

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[12] Governor Wilson of New York, upon signing that State's repealer, observed:

"It is with great reluctance that I approve a bill that overturns a solemn pledge of the State. I take this extraordinary step only because it will lead to an end of the existing controversy over the validity of the statutory covenant, a controversy that can only have an adverse affect [*sic*] upon the administration and financing of the Port Authority, and because it will lead to a speedy resolution by the courts of the questions and issues concerning the validity of the statutory covenant. Because it is the province of the courts to decide questions of constitutionality, I will not prevent the covenant issue from being brought before them, especially where it is the unanimously expressed desire of the members of both houses of the New York State Legislature as well as the expressed will of the Governor and both houses of the Legislature of the State of New Jersey to do so." App. 774a.

this Court involving the Contract Clause are evidence of its important place in our constitutional jurisprudence. Over the last century, however, the Fourteenth Amendment has assumed a far larger place in constitutional adjudication concerning the States. We feel that the present role of the Contract Clause is largely illuminated by two of this Court's decisions. In each, legislation was sustained despite a claim that it had impaired the obligations of contracts.

Home Building & Loan Assn. v. *Blaisdell*, 290 U. S. 398 (1934), is regarded as the leading case in the modern era of Contract Clause interpretation. At issue was the Minnesota Mortgage Moratorium Law, enacted in 1933, during the depth of the Depression and when that State was under severe economic stress, and appeared to have no effective alternative. The statute was a temporary measure that allowed judicial extension of the time for redemption; a mortgagor who remained in possession during the extension period was required to pay a reasonable income or rental value to the mortgagee. A closely divided Court, in an opinion by Mr. Chief Justice Hughes, observed that "emergency may furnish the occasion for the exercise of power" and that the "constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions." *Id.*, at 426. It noted that the debates in the Constitutional Convention were of little aid in the construction of the Contract Clause, but that the general purpose of the Clause was clear: to encourage trade and credit by promoting confidence in the stability of contractual obligations. *Id.*, at 427–428. Nevertheless, a State "continues to possess authority to safeguard the vital interests of its people. . . . This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court." *Id.*, at 434–435. The great clauses of the Constitution are to be considered in the

light of our whole experience, and not merely as they would be interpreted by its Framers in the conditions and with the outlook of their time. *Id.*, at 443.

This Court's most recent Contract Clause decision is *El Paso* v. *Simmons*, 379 U. S. 497 (1965). That case concerned a 1941 Texas statute that limited to a 5-year period the reinstatement rights of an interest-defaulting purchaser of land from the State. For many years prior to the enactment of that statute, such a defaulting purchaser, under Texas law, could have reinstated his claim to the land upon written request and payment of delinquent interest, unless rights of third parties had intervened. This Court held that "it is not every modification of a contractual promise that impairs the obligation of contract under federal law." *Id.*, at 506–507. It observed that the State "has the 'sovereign right . . . to protect the . . . general welfare of the people'" and "'we must respect the "wide discretion on the part of the legislature in determining what is and what is not necessary,"'" *id.*, at 508–509, quoting *East New York Savings Bank* v. *Hahn*, 326 U. S. 230, 232–233 (1945). The Court recognized that "the power of a State to modify or affect the obligation of contract is not without limit," but held that "the objects of the Texas statute make abundantly clear that it impairs no protected right under the Contract Clause." 379 U. S., at 509.

Both of these cases eschewed a rigid application of the Contract Clause to invalidate state legislation. Yet neither indicated that the Contract Clause was without meaning in modern constitutional jurisprudence, or that its limitation on state power was illusory. Whether or not the protection of contract rights comports with current views of wise public policy, the Contract Clause remains a part of our written Constitution. We therefore must attempt to apply that constitutional provision to the instant case with due respect for its purpose and the prior decisions of this Court.

III

We first examine appellant's general claim that repeal of the 1962 covenant impaired the obligation of the States' contract with the bondholders. It long has been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties. *Fletcher* v. *Peck*, 6 Cranch 87, 137–139 (1810); *Dartmouth College* v. *Woodward*, 4 Wheat. 518 (1819). Yet the Contract Clause does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with retroactive effects.[13] Thus, as a preliminary matter, appellant's claim requires a determination that the repeal has the effect of impairing a contractual obligation.

In this case the obligation was itself created by a statute, the 1962 legislative covenant. It is unnecessary, however, to dwell on the criteria for determining whether state legislation gives rise to a contractual obligation.[14] The trial court

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[13] The Contract Clause is in the phrase of the Constitution which contains the prohibition against any State's enacting a bill of attainder or *ex post facto* law. Notwithstanding Mr. Chief Justice Marshall's reference to these two other forbidden categories in *Fletcher* v. *Peck*, 6 Cranch, at 138–139, it is clear that they limit the powers of the States only with regard to the imposition of punishment. *Cummings* v. *Missouri*, 4 Wall. 277, 322–326 (1867); *Calder* v. *Bull*, 3 Dall. 386, 390–391 (1798). The Due Process Clause of the Fourteenth Amendment generally does not prohibit retrospective civil legislation, unless the consequences are particularly "harsh and oppressive." *Welch* v. *Henry*, 305 U. S. 134, 147 (1938). See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 14–20 (1976).

[14] In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State. Compare *Dodge* v. *Board of Education*, 302 U. S. 74, 78–79 (1937), with *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 104–105 (1938). In addition, statutes governing the interpretation and enforcement of contracts may be

found, 134 N. J. Super., at 183 n. 38, 338 A. 2d, at 866 n. 38, and appellees do not deny, that the 1962 covenant constituted a contract between the two States and the holders of the Consolidated Bonds issued between 1962 and the 1973 prospective repeal.[15] The intent to make a contract is clear from the statutory language: "The 2 States covenant and agree with each other and with the holders of any affected bonds . . . ." 1962 N. J. Laws, c. 8, § 6; 1962 N. Y. Laws, c. 209, § 6. Moreover, as the chronology set forth above reveals, the purpose of the covenant was to invoke the constitutional protection of the Contract Clause as security against repeal. In return for their promise, the States received the benefit they bargained for: public marketability of Port Authority bonds to finance construction of the World Trade Center and acquisition of the Hudson & Manhattan Railroad. We therefore have no doubt that the 1962 covenant has been properly characterized as a contractual obligation of the two States.

The parties sharply disagree about the value of the 1962

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regarded as forming part of the obligation of contracts made under their aegis. See n. 17, *infra*. See generally Hale, The Supreme Court and the Contract Clause: II, 57 Harv. L. Rev. 621, 663–670 (1944).

[15] Between the enactment of the 1962 covenant and its retrospective repeal in 1974, the Port Authority issued and sold to the public $1,260 million of Consolidated Bonds. The Fortieth and Forty-first Series, for which appellant is trustee, were issued after the 1973 prospective repeal and prior to the retrospective repeal. The holders of those bonds were not parties to the 1962 covenant, since the States undoubtedly had the power to repeal the covenant prospectively. See *Ogden* v. *Saunders*, 12 Wheat. 213 (1827). The subsequent bondholders arguably are like third-party beneficiaries of the covenant. There is testimony in the record that they were indirectly protected because the bonds outstanding at the time of the prospective repeal (in excess of $1 billion) could not be expected to be retired in the foreseeable future. App. 1105a. We need not decide whether that indirect relationship supports standing to challenge the retroactive repeal, however. Appellant also sued as a holder of Consolidated Bonds (some $72 million) issued between 1962 and 1973. *Id.*, at 56a–57a.

covenant to the bondholders. Appellant claims that after repeal the secondary market for affected bonds became "thin" and the price fell in relation to other formerly comparable bonds. This claim is supported by the trial court's finding that "immediately following repeal and for a number of months thereafter the market price for Port Authority bonds was adversely affected." 134 N. J. Super., at 180, 338 A. 2d, at 865. Appellees respond that the bonds nevertheless retained an "A" rating from the leading evaluating services and that after an initial adverse effect they regained a comparable price position in the market. Findings of the trial court support these claims as well. *Id.*, at 179–182, 338 A. 2d, at 864–866. The fact is that no one can be sure precisely how much financial loss the bondholders suffered. Factors unrelated to repeal may have influenced price. In addition, the market may not have reacted fully, even as yet, to the covenant's repeal, because of the pending litigation and the possibility that the repeal would be nullified by the courts.

In any event, the question of valuation need not be resolved in the instant case because the State has made no effort to compensate the bondholders for any loss sustained by the repeal.[16] As a security provision, the covenant was not superfluous; it limited the Port Authority's deficits and thus protected the general reserve fund from depletion. Nor was the covenant merely modified or replaced by an arguably comparable security provision. Its outright repeal totally eliminated an important security provision and thus impaired the obligation of the States' contract. See *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co.*, 300 U. S. 124, 128–129 (1937).[17]

[16] Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid. *Contributors to Pennsylvania Hospital* v. *Philadelphia*, 245 U. S. 20 (1917); see *El Paso* v. *Simmons*, 379 U. S. 497, 533–534 (1965) (Black, J., dissenting).

[17] The obligations of a contract long have been regarded as including not only the express terms but also the contemporaneous state law per-

The trial court recognized that there was an impairment in this case: "To the extent that the repeal of the covenant authorizes the Authority to assume greater deficits for such

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taining to interpretation and enforcement. "This Court has said that 'the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.'" *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 429–430 (1934), quoting *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 550 (1867). See also *Ogden* v. *Saunders*, 12 Wheat., at 259–260, 297–298 (opinions of Washington and Thompson, JJ.). This principle presumes that contracting parties adopt the terms of their bargain in reliance on the law in effect at the time the agreement is reached.

It is not always unconstitutional, however, for changes in statutory remedies to affect pre-existing contracts. During the early years when the Contract Clause was regarded as an absolute bar to any impairment, this result was reached by treating remedies in a manner distinct from substantive contract obligations. Thus, for example, a State could abolish imprisonment for debt because elimination of this remedy did not impair the underlying obligation. *Penniman's Case*, 103 U. S. 714 (1881); *Mason* v. *Haile*, 12 Wheat. 370 (1827); see *Sturges* v. *Crowninshield*, 4 Wheat. 122, 200–201 (1819).

Yet it was also recognized very early that the distinction between remedies and obligations was not absolute. Impairment of a remedy was held to be unconstitutional if it effectively reduced the value of substantive contract rights. *Green* v. *Biddle*, 8 Wheat. 1, 75–76, 84–85 (1823). See also *Bronson* v. *Kinzie*, 1 How. 311, 315–318 (1843); *Von Hoffman* v. *City of Quincy*, 4 Wall., at 552–554. More recent decisions have not relied on the remedy/obligation distinction, primarily because it is now recognized that obligations as well as remedies may be modified without necessarily violating the Contract Clause. *El Paso* v. *Simmons*, 379 U. S., at 506–507, and n. 9; *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S., at 429–435.

Although now largely an outdated formalism, the remedy/obligation distinction may be viewed as approximating the result of a more particularized inquiry into the legitimate expectations of the contracting parties. The parties may rely on the continued existence of adequate statutory remedies for enforcing their agreement, but they are unlikely to expect that state law will remain entirely static. Thus, a reasonable modification of statutes governing contract remedies is much less likely to upset

purposes, it permits a diminution of the pledged revenues and reserves and may be said to constitute an impairment of the states' contract with the bondholders." 134 N. J. Super., at 183, 338 A. 2d, at 866.

Having thus established that the repeal impaired a contractual obligation of the States, we turn to the question whether that impairment violated the Contract Clause.

IV

Although the Contract Clause appears literally to proscribe "any" impairment, this Court observed in *Blaisdell* that "the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula." 290 U. S., at 428. Thus, a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution. In the instant case, as in *Blaisdell*, we must attempt to reconcile the strictures of the Contract Clause with the "essential attributes of sovereign power," *id.*, at 435, necessarily reserved by the States to safeguard the welfare of their citizens. *Id.*, at 434–440.

The trial court concluded that repeal of the 1962 covenant was a valid exercise of New Jersey's police power because repeal served important public interests in mass transportation, energy conservation, and environmental protection. 134 N. J. Super., at 194–195, 338 A. 2d, at 873. Yet the Contract Clause limits otherwise legitimate exercises of state legislative authority, and the existence of an important public interest is not always sufficient to overcome that limitation. "Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power." *Blaisdell*, 290 U. S., at 439. Moreover, the

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expectations than a law adjusting the express terms of an agreement. In this respect, the repeal of the 1962 covenant is to be seen as a serious disruption of the bondholders' expectations.

scope of the State's reserved power depends on the nature of the contractual relationship with which the challenged law conflicts.

The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. Otherwise, one would be able to obtain immunity from state regulation by making private contractual arrangements. This principle is summarized in Mr. Justice Holmes' well-known dictum: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 357 (1908).[18]

Yet private contracts are not subject to unlimited modification under the police power. The Court in *Blaisdell* recognized that laws intended to regulate existing contractual relationships must serve a legitimate public purpose. 290 U. S., at 444–445. A State could not "adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." *Id.*, at 439. Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption. *Id.*, at 445–447.[19] As is customary in reviewing economic and social

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[18] Accord: *Stephenson* v. *Binford*, 287 U. S. 251, 276 (1932); *Manigault* v. *Springs*, 199 U. S. 473, 480 (1905). See *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S., at 437–438.

[19] *Blaisdell* suggested further limitations that have since been subsumed in the overall determination of reasonableness. The legislation sustained in *Blaisdell* was adopted pursuant to a declared emergency in the State and strictly limited in duration. Subsequent decisions struck down state laws that were not so limited. *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426, 432–434 (1934) (relief not limited as to "time, amount, circumstances, or need"); *Treigle* v. *Acme Homestead Assn.*, 297 U. S. 189, 195 (1936) (no emergency or temporary measure). Later decisions abandoned these limitations as absolute requirements. *Veix* v. *Sixth Ward Building &*

regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure. *East New York Savings Bank* v. *Hahn*, 326 U. S. 230 (1945).

When a State impairs the obligation of its own contract, the reserved-powers doctrine has a different basis. The initial inquiry concerns the ability of the State to enter into an agreement that limits its power to act in the future. As early as *Fletcher* v. *Peck*, the Court considered the argument that "one legislature cannot abridge the powers of a succeeding legislature." 6 Cranch, at 135. It is often stated that "the legislature cannot bargain away the police power of a State." *Stone* v. *Mississippi*, 101 U. S. 814, 817 (1880).[20] This doctrine requires a determination of the State's power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment. In short, the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty.

In deciding whether a State's contract was invalid *ab initio* under the reserved-powers doctrine, earlier decisions relied on distinctions among the various powers of the State. Thus, the

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Loan Assn., 310 U. S., 32, 39–40 (1940) (emergency need not be declared and relief measure need not be temporary); *East New York Savings Bank* v. *Hahn*, 326 U. S. 230 (1945) (approving 10th extension of one-year mortgage moratorium). Undoubtedly the existence of an emergency and the limited duration of a relief measure are factors to be assessed in determining the reasonableness of an impairment, but they cannot be regarded as essential in every case.

[20] *Stone* v. *Mississippi* sustained the State's revocation of a 25-year charter to operate a lottery. Other cases similarly have held that a State is without power to enter into binding contracts not to exercise its police power in the future. *E. g.*, *Pierce Oil Corp.* v. *City of Hope*, 248 U. S. 498, 501 (1919); *Atlantic Coast Line R. Co.* v. *Goldsboro*, 232 U. S. 548, 558 (1914); *Douglas* v. *Kentucky*, 168 U. S. 488, 502–505 (1897). See *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S., at 436–437.

police power and the power of eminent domain were among those that could not be "contracted away," but the State could bind itself in the future exercise of the taxing and spending powers.[21] Such formalistic distinctions perhaps cannot be dispositive, but they contain an important element of truth. Whatever the propriety of a State's binding itself to a future course of conduct in other contexts, the power to enter into effective financial contracts cannot be questioned. Any financial obligation could be regarded in theory as a relinquishment of the State's spending power, since money spent to repay debts is not available for other purposes. Similarly, the taxing power may have to be exercised if debts are to be repaid. Notwithstanding these effects, the Court has regularly held that the States are bound by their debt contracts.[22]

The instant case involves a financial obligation and thus as a threshold matter may not be said automatically to fall

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[21] In *New Jersey* v. *Wilson*, 7 Cranch 164 (1812), the Court held that a State could properly grant a permanent tax exemption and that the Contract Clause prohibited any impairment of such an agreement. This holding has never been repudiated, although tax exemption contracts generally have not received a sympathetic construction. See B. Wright, The Contract Clause of the Constitution 179–194 (1938).

By contrast, the doctrine that a State cannot contract away the power of eminent domain has been established since *West River Bridge Co.* v. *Dix*, 6 How. 507 (1848). See *Contributors to Pennsylvania Hospital* v. *Philadelphia*, 245 U. S., at 23–24. The doctrine that a State cannot be bound to a contract forbidding the exercise of its police power is almost as old. See n. 20, *supra*.

[22] State laws authorizing the impairment of municipal bond contracts have been held unconstitutional. *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56 (1935); *Louisiana* v. *Pilsbury*, 105 U. S. 278 (1882). Similarly, a tax on municipal bonds was held unconstitutional because its effect was to reduce the contractual rate of interest. *Murray* v. *Charleston*, 96 U. S. 432, 443–446 (1878).

A number of cases have held that a State may not authorize a municipality to borrow money and then restrict its taxing power so that the debt cannot be repaid. *Louisiana ex rel. Hubert* v. *New Orleans*, 215 U. S. 170, 175–178 (1909); *Wolff* v. *New Orleans*, 103 U. S. 358, 365–368 (1881);

within the reserved powers that cannot be contracted away.[23] Not every security provision, however, is necessarily financial. For example, a revenue bond might be secured by the State's promise to continue operating the facility in question; yet such a promise surely could not validly be construed to bind the State never to close the facility for health or safety reasons. The security provision at issue here, however, is different: The States promised that revenues and reserves securing the bonds would not be depleted by the Port Authority's operation of deficit-producing passenger railroads beyond the level of "permitted deficits." Such a promise is purely financial and thus not necessarily a compromise of the State's reserved powers.

Of course, to say that the financial restrictions of the 1962 covenant were valid when adopted does not finally resolve this case. The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations.[24] As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying

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Von Hoffman v. *City of Quincy*, 4 Wall., at 554–555. See *Fisk* v. *Jefferson Police Jury*, 116 U. S. 131 (1885) (contract for payment of public officer).

See also *Wood* v. *Lovett*, 313 U. S. 362 (1941); *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95 (1938).

[23] "The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." *Murray* v. *Charleston*, 96 U. S., at 445.

[24] See *El Paso* v. *Simmons*, 379 U. S. 497 (1965); *Faitoute Iron & Steel Co.* v. *City of Asbury Park*, 316 U. S. 502 (1942); *Louisiana* v. *New Orleans*, 102 U. S. 203 (1880).

this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.[25]

The trial court recognized to an extent the special status of a State's financial obligations when it held that *total* repudiation, presumably for even a worthwhile public purpose, would be unconstitutional. But the trial court regarded the protection of the Contract Clause as available only in such an extreme case: "The states' inherent power to protect the public welfare may be validly exercised under the Contract Clause even if it impairs a contractual obligation so long as it does not destroy it." 134 N. J. Super., at 190, 338 A. 2d, at 870–871.

The trial court's "total destruction" test is based on what we think is a misreading of *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56 (1935).[26] In the first place, the impairment held

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[25] For similar reasons, a dual standard of review was applied under the Fifth Amendment to federal legislation abrogating contractual gold clauses. "There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers." *Perry* v. *United States*, 294 U. S. 330, 350–351 (1935). Cf. *Norman* v. *Baltimore & O. R. Co.*, 294 U. S. 240, 304–305 (1935). See also *Lynch* v. *United States*, 292 U. S. 571, 580 (1934) (need for money is no excuse for repudiating contractual obligations); Note, The Constitutionality of the New York Municipal Wage Freeze and Debt Moratorium: Resurrection of the Contract Clause, 125 U. Pa. L. Rev. 167, 188–191 (1976).

[26] In *Kavanaugh*, the State changed its statutory procedure for enforcing certain municipal assessments against property owners. The holders of bonds for which the assessments were pledged as security were found to

unconstitutional in *Kavanaugh* was one that affected the value of a security provision, and certainly not every bond would have been worthless. More importantly, Mr. Justice Cardozo needed only to state an "outermost limits" test in the Court's opinion, *id.*, at 60, because the impairment was so egregious. He expressly recognized that the actual line between permissible and impermissible impairments could well be drawn more narrowly. Thus the trial court was not correct when it drew the negative inference that any impairment less oppressive than the one in *Kavanaugh* was necessarily constitutional. The extent of impairment is certainly a relevant factor in determining its reasonableness. But we cannot sustain the repeal of the 1962 covenant simply because the bondholders' rights were not totally destroyed.

The only time in this century that alteration of a municipal bond contract has been sustained by this Court was in *Faitoute Iron & Steel Co.* v. *City of Asbury Park*, 316 U. S. 502 (1942). That case involved the New Jersey Municipal Finance Act, which provided that a bankrupt local government could be placed in receivership by a state agency. A plan for the composition of creditors' claims was required to be approved by the agency, the municipality, and 85% in amount of the creditors. The plan would be binding on nonconsenting creditors after a state court conducted a hearing and found that the municipality could not otherwise pay off its creditors and that the plan was in the best interest of all creditors. *Id.*, at 504.

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have contract rights in the previous statutory scheme. Without classifying the enforcement statutes as substantive or remedial, the Court held the change unconstitutional because it "[took] from the mortgage the quality of an acceptable investment for a rational investor." 295 U. S., at 60. In the instant case the State has repudiated an express promise rather than one implied from the statutory scheme in effect at the time of the contract. Thus, the instant case may be regarded as a more serious abrogation of the bondholders' expectations than occurred in *Kavanaugh*. See n. 17, *supra*.

Under the specific composition plan at issue in *Faitoute*, the holders of revenue bonds received new securities bearing lower interest rates and later maturity dates. This Court, however, rejected the dissenting bondholders' Contract Clause objections. The reason was that the old bonds represented only theoretical rights; as a practical matter the city could not raise its taxes enough to pay off its creditors under the old contract terms. The composition plan enabled the city to meet its financial obligations more effectively. "The necessity compelled by unexpected financial conditions to modify an original arrangement for discharging a city's debt is implied in every such obligation for the very reason that thereby the obligation is discharged, not impaired." *Id.*, at 511. Thus, the Court found that the composition plan was adopted with the purpose and effect of protecting the creditors, as evidenced by their more than 85% approval. Indeed, the market value of the bonds increased sharply as a result of the plan's adoption. *Id.*, at 513.

It is clear that the instant case involves a much more serious impairment than occurred in *Faitoute*. No one has suggested here that the States acted for the purpose of benefiting the bondholders, and there is no serious contention that the value of the bonds was enhanced by repeal of the 1962 covenant. Appellees recognized that it would have been impracticable to obtain consent of the bondholders for such a change in the 1962 covenant, Brief for Appellees 97–98, even though only 60% approval would have been adequate. See n. 10, *supra*. We therefore conclude that repeal of the 1962 covenant cannot be sustained on the basis of this Court's prior decisions in *Faitoute* and other municipal bond cases.

V

Mass transportation, energy conservation, and environmental protection are goals that are important and of legitimate public concern. Appellees contend that these goals are so

important that any harm to bondholders from repeal of the 1962 covenant is greatly outweighed by the public benefit. We do not accept this invitation to engage in a utilitarian comparison of public benefit and private loss. Contrary to Mr. Justice Black's fear, expressed in sole dissent in *El Paso* v. *Simmons*, 379 U. S., at 517, the Court has not "balanced away" the limitation on state action imposed by the Contract Clause. Thus a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors. We can only sustain the repeal of the 1962 covenant if that impairment was both reasonable and necessary to serve the admittedly important purposes claimed by the State.[27]

The more specific justification offered for the repeal of the 1962 covenant was the States' plan for encouraging users of private automobiles to shift to public transportation. The States intended to discourage private automobile use by raising bridge and tunnel tolls and to use the extra revenue from those tolls to subsidize improved commuter railroad service. Appellees contend that repeal of the 1962 covenant was necessary to implement this plan because the new mass transit facilities could not possibly be self-supporting and the covenant's "permitted deficits" level had already been exceeded. We reject this justification because the repeal was neither necessary to achievement of the plan nor reasonable in light of the circumstances.

The determination of necessity can be considered on two levels. First, it cannot be said that total repeal of the cov-

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[27] The dissent suggests, *post*, at 41–44, that such careful scrutiny is unwarranted in this case because the harm to bondholders is relatively small. For the same reason, however, contractual obligations of this magnitude need not impose barriers to changes in public policy. The States remain free to exercise their powers of eminent domain to abrogate such contractual rights, upon payment of just compensation. See n. 16, *supra*.

enant was essential; a less drastic modification would have permitted the contemplated plan without entirely removing the covenant's limitations on the use of Port Authority revenues and reserves to subsidize commuter railroads.[28] Second, without modifying the covenant at all, the States could have adopted alternative means of achieving their twin goals of discouraging automobile use and improving mass transit.[29] Appellees contend, however, that choosing among these alternatives is a matter for legislative discretion. But a State is not completely free to consider impairing the obliga-

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[28] If in fact the States sought to divert only new revenues to subsidize mass transit, then the covenant could have been amended to exclude the additional bridge and tunnel tolls from the revenue use limitation that was imposed. Such a change would not have reduced the covenant to a nullity because it would have continued to prevent the diminution of revenues and reserves that historically secured the bonds. And even if the plan contemplated use of current revenues and reserves, the formula for computing "permitted deficits" perhaps could have been modified without totally abandoning an objective limitation on the Port Authority's involvement in deficit mass transit. Finally, the procedures for obtaining bondholder approval could have been modified so that such consent would present a feasible means of undertaking new projects. See n. 10, *supra*.

Of course, we express no opinion as to whether any of these lesser impairments would be constitutional.

[29] Transportation control strategies are available that do not require direct application of revenues from bridge and tunnel tolls to subsidize mass transit. In calling for air pollution abatement measures in New Jersey, the Administrator of the Environmental Protection Agency encouraged "close examination" of such measures as, *inter alia*, "State taxes to encourage VMT [vehicle miles traveled] reductions while raising revenues to benefit mass transit" and realignment of toll structures by "elimination of commuter discounts" and "possibly an increase in tolls during peak commuting times to encourage carpools." 38 Fed. Reg. 31389 (1973). Thus, the States could discourage automobile use through taxes on gasoline or parking, for example, and use the revenues to subsidize mass transit projects so they would be "self-supporting" within the meaning of the covenant. Bridge and tunnel tolls could be increased for commuters and decreased at other times, so that there would be no excess revenue for purposes of the General Bridge Act of 1946, 33 U. S. C. § 526.

tions of its own contracts on a par with other policy alternatives. Similarly, a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well. In *El Paso* v. *Simmons, supra,* the imposition of a five-year statute of limitations on what was previously a perpetual right of redemption was regarded by this Court as "quite clearly necessary" to achieve the State's vital interest in the orderly administration of its school lands program. 379 U. S., at 515–516. In the instant case the State has failed to demonstrate that repeal of the 1962 covenant was similarly necessary.

We also cannot conclude that repeal of the covenant was reasonable in light of the surrounding circumstances. In this regard a comparison with *El Paso* v. *Simmons, supra,* again is instructive. There a 19th century statute had effects that were unforeseen and unintended by the legislature when originally adopted. As a result speculators were placed in a position to obtain windfall benefits. The Court held that adoption of a statute of limitation was a reasonable means to "restrict a party to those gains reasonably to be expected from the contract" when it was adopted. 379 U. S., at 515.[30]

By contrast, in the instant case the need for mass transportation in the New York metropolitan area was not a new development, and the likelihood that publicly owned commuter railroads would produce substantial deficits was well known. As early as 1922, over a half century ago, there were pressures to involve the Port Authority in mass transit. It was with

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[30] This Court previously has regarded the elimination of unforeseen windfall benefits as a reasonable basis for sustaining changes in statutory deficiency judgment procedures. These changes were adopted by several States when unexpected reductions in property values during the Depression permitted some mortgagees to recover far more than their legitimate entitlement. See *Gelfert* v. *National City Bank,* 313 U. S. 221, 233–235 (1941); *Honeyman* v. *Jacobs,* 306 U. S. 539, 542–543 (1939); *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co.,* 300 U. S. 124, 130–131 (1937).

full knowledge of these concerns that the 1962 covenant was adopted. Indeed, the covenant was specifically intended to protect the pledged revenues and reserves against the possibility that such concerns would lead the Port Authority into greater involvement in deficit mass transit.

During the 12-year period between adoption of the covenant and its repeal, public perception of the importance of mass transit undoubtedly grew because of increased general concern with environmental protection and energy conservation. But these concerns were not unknown in 1962, and the subsequent changes were of degree and not of kind. We cannot say that these changes caused the covenant to have a substantially different impact in 1974 than when it was adopted in 1962. And we cannot conclude that the repeal was reasonable in the light of changed circumstances.

We therefore hold that the Contract Clause of the United States Constitution prohibits the retroactive repeal of the 1962 covenant. The judgment of the Supreme Court of New Jersey is reversed.

It is so ordered.

MR. JUSTICE STEWART took no part in the decision of this case.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE BURGER, concurring.

In my view, to repeal the 1962 covenant without running afoul of the constitutional prohibition against the impairment of contracts, the State must demonstrate that the impairment was essential to the achievement of an important state purpose. Furthermore, the State must show that it did not know and could not have known the impact of the contract on that state interest at the time that the contract was made. So reading the Court's opinion, I join it.

For emphasis, I note that the Court pointedly does not hold that, on the facts of this case, any particular "less drastic modification" would pass constitutional muster, *ante*, at 30, and n. 28.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

Decisions of this Court for at least a century have construed the Contract Clause largely to be powerless in binding a State to contracts limiting the authority of successor legislatures to enact laws in furtherance of the health, safety, and similar collective interests of the polity. In short, those decisions established the principle that lawful exercises of a State's police powers stand paramount to private rights held under contract. Today's decision, in invalidating the New Jersey Legislature's 1974 repeal of its predecessor's 1962 covenant, rejects this previous understanding and remolds the Contract Clause into a potent instrument for overseeing important policy determinations of the state legislature. At the same time, by creating a constitutional safe haven for property rights embodied in a contract, the decision substantially distorts modern constitutional jurisprudence governing regulation of private economic interests. I might understand, though I could not accept, this revival of the Contract Clause were it in accordance with some coherent and constructive view of public policy. But elevation of the Clause to the status of regulator of the municipal bond market at the heavy price of frustration of sound legislative policymaking is as demonstrably unwise as it is unnecessary. The justification for today's decision, therefore, remains a mystery to me, and I respectfully dissent.

I

The Court holds that New Jersey's repeal of the 1962 covenant constitutes an unreasonable invasion of contract rights and hence an impairment of contract. The formulation of

the legal standard by which the Court would test asserted impairments of contracts is, to me, both unprecedented and most troubling. But because the Constitution primarily is " 'intended to preserve practical and substantial rights, not to maintain theories,' " *Faitoute Iron & Steel Co.* v. *City of Asbury Park*, 316 U. S. 502, 514 (1942), it is necessary to sketch the factual background of this dispute before discussing the reasons for my concern. In my view, the Court's casual consideration both of the substantial public policies that prompted New Jersey's repeal of the 1962 covenant, and of the relatively inconsequential burdens that resulted for the Authority's creditors, belies its conclusion that the State acted unreasonably in seeking to relieve its citizens from the strictures of this earlier legislative policy.

A

In an era when problems of municipal planning increasingly demand regional rather than local solutions, the Port Authority provides the New York-New Jersey community with a readymade, efficient regional entity encompassing some 1,500 square miles surrounding the Statue of Liberty. As the Court notes, from the outset public officials of both New York and New Jersey were well aware of the Authority's heavy dependence on public financing. Consequently, beginning in the decade prior to the enactment of the 1962 covenant, the Authority's general reserve bonds, its primary vehicle of public finance, have featured two rigid security devices designed to safeguard the investment of bondholders. First, pursuant to a so-called "1.3 test," the Authority has been disabled from issuing new consolidated bonds unless the best one-year net revenues derived from all of the Authority's facilities at least equal 130% of the prospective debt service for the calendar year during which the debt service for all outstanding and proposed bonds would be at a maximum. Second, according to a procedure known as a "section 7 certifi-

cation," the Authority may not issue bonds to finance additional facilities unless it "shall certify" that the issue "will not, during the ensuing ten years or during the longest term of any such bonds proposed to be issued . . . , whichever shall be longer, . . . materially impair the sound credit standing of the Authority . . . ." App. 811a–812a.

The 1962 covenant existed alongside these security provisions. Viewed in simplest terms, the covenant served to preclude Authority investment and participation in transportation programs by shifting the financial focal point from the creditworthiness of the Authority's activities as a whole to the solvency of each proposed new transit project. Whereas the 1.3 and section 7 tests permit expanded involvement in mass transportation provided that the enormous revenue-generating potential of the Authority's bridges and tunnels aggregately suffice to secure the investments of creditors, the covenant effectively foreclosed participation in any new project that was not individually "self-supporting."[1] Both parties to this litigation are in apparent agreement that few functional mass transit systems are capable of satisfying this requirement.

Whether the 1962 New Jersey Legislature acted wisely in accepting this new restriction is, for me, quite irrelevant. What is important is that the passage of the years conclusively demonstrated that this effective barrier to the development

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[1] The covenant does enable the Authority to finance passenger railroad facilities to a level of "permitted deficits," defined as one-tenth of the General Reserve Fund or 1% of the total bonded indebtedness. While the Court notes in passing that this provision "permitted, and perhaps even contemplated, additional Port Authority involvement in deficit rail mass transit," *ante*, at 11, the formula restricts the Authority to a small percentage of the fund, even though aggregate reserves and revenues may far exceed expenses and creditor claims. In any event, the parties have stipulated that as a practical matter the Authority has been unable to expand its involvement in rapid transit by reliance on this alternative formula. App. 692a.

of rapid transit in the port region squarely conflicts with the legitimate needs of the New York metropolitan community, and will persist in doing so into the next century.[2] In the Urban Mass Transportation Assistance Act of 1970, 49 U. S. C. § 1601a, Congress found that "within urban areas . . . the ability of all citizens to move quickly and at a reasonable cost [has become] an urgent national problem." Concurrently, the Clean Air Act, as amended, 42 U. S. C. § 1857 *et seq.*, advocated the curtailment of air pollution through the development of transportation-control strategies that place heavy emphasis on rapid transit alternatives to the automobile. For northern New Jersey in particular, with ambient air-quality levels among the worst in the Nation, the Clean Air Act has led to new regulations premised on the policy:

> "The development of large-scale mass transit facilities and the expansion and modification of existing mass transit facilities is essential to any effort to reduce automotive pollution through reductions in vehicle use. The planning, acquisition, and operation of a mass transit system is, and should remain, a regional or State responsibility. Many improvements are being planned in mass transit facilities in the State that will make it possible for more people to use mass transit instead of automobiles." 38 Fed. Reg. 31389 (1973).

Finally, the Court itself cites the Emergency Petroleum Allocation Act, 15 U. S. C. § 751 (a)(3) (1970 ed., Supp. V), which signaled "a national energy crisis which is a threat to the public health, safety, and welfare," and sought to stimulate

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[2] The 1962 covenant does not merely bind the Authority's hands for the decades of the 1960's and 1970's. Rather, the covenant will preclude the deployment of the Authority's toll revenues to public transit needs until all the bonds previously issued under the covenant have been retired. Appellant trust company advises that the covenant thus continues "as a practical matter until the year 2007," Brief for Appellant 24, even if now repealed prospectively as suggested *ante*, at 18 n. 15.

further initiatives toward the development of public transportation and similar programs. See *ante*, at 14.

It was in response to these societal demands that the New Jersey and New York Legislatures repealed the 1962 covenant. The trial court found:

> "In April 1970 Governors Cahill and Rockefeller announced a joint program to increase the Port Authority's role in mass transportation by building a rail link to John F. Kennedy International Airport and extending PATH [a commuter rail line under Authority control] to Newark International Airport and other parts of New Jersey." 134 N. J. Super. 124, 168–169, 338 A. 2d 833, 858 (1975).

But, the court found, this expansion "was not economically feasible under the terms of the 1962 covenant." *Id.*, at 170, 338 A. 2d, at 859. Consequently, the States repealed the covenant. On signing the New York legislation, Governor Rockefeller stated:

> . "Passed with overwhelming bipartisan support in both houses of the Legislature, the bill removes the absolute statutory prohibition against the use of the revenues of the Port of New York Authority for railroad purposes. That statutory covenant, together with the provision of the bi-state compact creating the Authority that neither State will construct competing facilities within the Port District, could forever preclude the two states from undertaking vitally needed mass transportation projects. In removing the present restriction, the bill would not jeopardize the security of Port Authority bondholders or their rights to maintain that security." Quoted *ibid.*

In following suit, New Jersey also expressly grounded its action upon the necessity of overturning " 'the restrictions imposed by the covenant [that] effectively preclude sufficient port authority participation in the development of a public transportation system in the port district.' " *Id.*, at 172, 338

A. 2d, at 860. Approximately one year later, on April 10, 1975, the Port Authority announced an increase in bridge and tunnel tolls amounting to $40 million, the resulting revenue designed to assist in the financing of passenger transportation facilities without jeopardizing the reserve fund set aside for the Authority's creditors.

The Court's consideration of this factual background is, I believe, most unsatisfactory. The Court never explicitly takes issue with the core of New Jersey's defense of the repeal: that the State was faced with serious and growing environmental, energy, and transportation problems, and the covenant worked at cross-purposes with efforts at remedying these concerns. Indeed, the Court candidly concedes that the State's purposes in effectuating the 1974 repeal were "admittedly important." *Ante*, at 29. Instead, the Court's analysis focuses upon related, but peripheral, matters.

For example, several hypothetical alternative methods are proposed whereby New Jersey might hope to secure funding for public transportation, and these are made the basis for a holding that repeal of the covenant was not "necessary." *Ante*, at 29–31. Setting aside the propriety of this surprising legal standard,[3] the Court's effort at fashioning its own legislative program for New York and New Jersey is notably unsuccessful. In fact, except for those proffered alternatives which also amount to a repeal or substantial modification of the 1962 covenant,[4] none of the Court's suggestions is com-

[3] See, *e. g.*, *infra*, at 59, and n. 17.

[4] See *ante*, at 30 n. 28. I am puzzled whether the Court really intends these alternatives to be taken seriously in view of the footnote's closing reminder that even these "lesser impairments" also may be found to be unconstitutional. If the Court, in fact, means that New Jersey and New York could remedy any Contract Clause defects merely by modifying their repeal of the 1962 covenant so as to limit transit subsidization solely to future toll increases—the policy that is being followed by the States in actual practice—then today's decision would be rendered into a temporary formalism.

patible with the basic antipollution and transportation-control strategies that are crucial to metropolitan New York. As the Court itself accurately recognizes, the environmental and transportation program for the New York area rests upon a two-step campaign: "The States inten[d] [1] to discourage private automobile use by raising bridge and tunnel tolls and [2] to use the extra revenue from those tolls to subsidize improved commuter railroad service." *Ante*, at 29. This coordinated two-step strategy has not been arbitrarily or casually created, but is dictated by contemporaneous federal enactments such as the Clean Air Act,[5] and stems both from New York City's unique geographic situation [6] and from longstanding provisions in federal law that require the existence of "reasonable and just" expenses—which may include diversion to mass transit subsidies—as a precondition to any increase in interstate bridge tolls.[7] The Court's various

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[5] Cf. *Friends of the Earth* v. *Carey*, 552 F. 2d 25 (CA2 1977); *Friends of the Earth* v. *Carey*, 535 F. 2d 165 (CA2 1976); *Friends of the Earth* v. *EPA*, 499 F. 2d 1118 (CA2 1974).

[6] Because cars entering or leaving Manhattan must pass over bridges or through tunnels, the regulation of tolls offers an unusually convenient and effective method of discouraging automobile usage in addition to promising a highly lucrative revenue base.

[7] Thus, if toll funds cannot be diverted to rapid transit needs, any increase in bridge revenues necessarily would produce an expansion of the Authority's general reserve fund well beyond that necessary or contemplated for the protection of bondholders. Faced with such a mere accumulation of capital, the Federal Highway Administrator, acting under § 503 of the General Bridge Act of 1946, 33 U. S. C. § 526, evidently would be obligated to disallow any toll increases as not "reasonable and just" under the Act. See generally *Delaware River Port Authority* v. *Tiemann*, 531 F. 2d 699 (CA3 1976). The United States Department of Transportation, however, has stated that "in some areas (New York, Philadelphia, San Francisco), bridge toll revenues provide significant support for transit capital and/or operating costs, thereby providing transit service improvements which promote decreased dependence on automobile travel." App. 726a–727a. The Department has recommended that a diversion of funds

alternative proposals, while perhaps interesting speculations, simply are not responsive to New York's and New Jersey's real environmental and traffic problems,[8] and, in any event, intrude the Court deeply into complex and localized policy matters that are for the States' legislatures and not the judiciary to resolve.

Equally unconvincing is the Court's contention that repeal of the 1962 covenant was unreasonable because the environmental and energy concerns that prompted such action "were not unknown in 1962, and the subsequent changes were of degree and not of kind." *Ante*, at 32. Nowhere are we told why a state policy, no matter how responsive to the general welfare of its citizens, can be reasonable only if it confronts issues that previously were absolutely unforeseen.[9] Indeed,

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to serve rapid transit needs should qualify as "reasonable and just," and, therefore, would be capable of supporting a general increase in toll revenues. *Ibid.* This is in stark contrast with the Court's suggested alternative policies outlined *ante*, at 30 n. 29, which would permit no general increase in bridge tolls and no coordination of the bridge toll and transit subsidization strategies that are central to the antipollution effort in metropolitan New York, and, therefore, until today, have been considered secondary and inadequate to serve the community's needs.

[8] See, *e. g.*, n. 7, *supra*. In short, all the alternatives that the Court leaves to the States, *ante*, at 30 n. 29, deny access to the Authority's tolls, even though they represent a potentially lucrative revenue source which can be tapped without injury to the bondholders. See Part B, *infra*.

[9] Indeed, the Court's single-minded emphasis on the existence of changed circumstances leads it to embrace a rather perverse constellation of values in which New Jersey's desire to care for the health, environmental, and energy needs of its citizenry is relegated to lesser importance than the desire of Texas in *El Paso* v. *Simmons*, 379 U. S. 497 (1965), to deny windfall economic gains to purchasers of school land from the State. *Ante*, at 31. I, of course, do not dispute the importance of Texas' stake in *Simmons*. But surely any reasonable ordering of values and social objectives would compel the conclusion that a State's concern for its citizens' health and general welfare is far more deserving of this Court's recognition.

this arbitrary perspective seems peculiarly inappropriate in a case like this where at least three new and independent congressional enactments between the years 1962 and 1974 summoned major urban centers like New York and New Jersey to action in the environmental, energy, and transportation fields. In short, on this record, I can neither understand nor accept the Court's characterization of New Jersey's action as unreasonable.

B

If the Court's treatment of New Jersey's legitimate policy interests is inadequate, its consideration of the countervailing injury ostensibly suffered by the appellant is barely discernible at all. For the Court apparently holds that a mere "technical impairment" of contract suffices to subject New Jersey's repealer to serious judicial scrutiny and invalidation under the Contract Clause. *Ante*, at 21. The Court's modest statement of the economic injury that today attracts its judicial intervention is, however, understandable. For fairly read, the record before us makes plain that the repeal of the 1962 covenant has occasioned only the most minimal damage on the part of the Authority's bondholders.

Obviously, the heart of the obligation to the bondholders—and the interests ostensibly safeguarded by the 1962 covenant—is the periodic payment of interest and the repayment of principal when due. The Court does not, and indeed cannot, contend that either New Jersey or the Authority has called into question the validity of these underlying obligations. No creditor complains that public authorities have defaulted on a coupon payment or failed to redeem a bond that has matured. In fact, the Court does not even offer any reason whatever for fearing that, as a result of the covenant's repeal, the securities in appellant's portfolio are jeopardized. Such a contention cannot be made in the face of the finding of the trial judge, who, in referring to the increasingly lucrative financial

position of the Authority at the date of the covenant's repeal in comparison to 1962, concluded:

> "Suffice it to say that between 1962 and 1974 the security afforded bondholders had been substantially augmented by a vast increase in Authority revenues and reserves, and the Authority's financial ability to absorb greater deficits, from whatever source and without any significant impairment of bondholder security, was correspondingly increased." 134 N. J. Super., at 194–195, 338 A. 2d, at 873.[10]

By simply ignoring this unchallenged finding concerning the Authority's overall financial posture, the Court is able to argue that the repeal of the 1962 covenant impaired the Authority's bonds in two particular respects. First, it is suggested that repeal of the covenant may have adversely affected the secondary market for the securities. *Ante*, at 19. The Court, however, acknowledges that appellant has adduced only ambiguous evidence to support this contention, and that the actual price position of Authority bonds was, at most, only temporarily affected by the repeal. *Ibid.*[11] In fact, the trial

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[10] The court found: "Between 1961 and 1973 the net revenues of the Authority increased from $68,000,000 to $137,000,000, and over that period the Authority had available to it $582,732,000 in excess of its debt service requirements . . . . Through 1974, the corresponding figures are $161,283,000 and $649,750,000, respectively." 134 N. J. Super., at 195 n. 43, 338 A. 2d, at 873 n. 43. Thus, both prior to and following the repeal of the covenant, the Authority's revenues and earned surplus continued their unhampered and overwhelmingly impressive growth.

[11] Indeed, one of the anomalous aspects of this suit is the Court's willingness to invalidate an Act of the State of New Jersey, and indirectly of New York, while apparently recognizing that if this were an action by creditors for damages, or an action to fix "just compensation," the trial court's findings raise serious doubt that any compensable monetary loss would be found. *Ante*, at 19. By sidestepping the damages question, *ibid.*, and by mandating reinstatement of the covenant, the Court manages to burden the Port Authority with an unwanted contract, while relieving the creditor-appellant of the need to establish any tangible

court also explicitly rejected the ultimate significance of this alleged injury:

> "The bottom line of plaintiff's proofs on this issue is simply that the *evidence fails to demonstrate that the secondary market price of Authority bonds was adversely affected by the repeal of the covenant,* except for a short-term fall-off in price, the effect of which has now been dissipated insofar as it can be related to the enactment of the repeal." 134 N. J. Super., at 181–182, 338 A. 2d, at 866 (emphasis supplied).

Secondly, repeal of the covenant is said to have canceled an important security provision enjoyed by the creditors. *Ante,* at 19. Of course, there is no question that appellant prefers the retention to the removal of the covenant, but surely this alone cannot be an acceptable basis for the Court's wooden application of the Contract Clause or for its conclusion that the repeal unfairly diminished bondholder security. By placing reliance on this superficial allegation of economic injury, the Court again is able simply to disregard the trial court's contrary finding that appellant's complaint of insecurity is without factual merit:

> *"The claim that bondholder security has been materially impaired or destroyed by the repeal is simply not supported by the record.* The pledge of the Authority's net revenues and reserves remains intact; the Authority will still be barred from the issuance of any new consolidated bonds unless the 1.3 test required by the CBR is met, and the Authority will continue to be prohibited from the

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economic injury arising from the covenant's repeal. This suggests that any protection afforded bondholders today may well prove to be purely illusory. Even after the mandate issues, New Jersey, we are told, may again condemn or repeal the covenant and offer just compensation to its creditors. See *ante,* at 29 n. 27. However, in light of the trial court's factual conclusions, this promise of compensation will entitle bondholders to little or no financial recovery.

> issuance of any consolidated bonds or other bonds secured by a pledge of the general reserve fund without the certification required by section 7 of the series resolutions, to wit, that in the opinion of the Authority the estimated expenditures in connection with any additional facility for which such bonds are to be issued would not, for the ensuing ten years, impair the sound credit standing of the Authority, the investment status of its consolidated bonds, or the Authority's obligations to its consolidated bondholders." 134 N. J. Super., at 196, 338 A. 2d, at 874 (emphasis supplied).[12]

In brief, only by disregarding the detailed factual findings of the trial court in a systematic fashion is the Court today able to maintain that repeal of the 1962 covenant was anything but a minimal interference with the realistic economic interests of the bondholders. The record in this case fairly establishes that we are presented with a relatively inconsequential infringement of contract rights in the pursuit of substantial and important public ends. Yet, this meager record is seized upon by the Court as the vehicle for resuscitation of long discarded Contract Clause doctrine—a step out of line with both the history of Contract Clause jurisprudence and with constitutional doctrine generally in its attempt to delineate the reach of the lawmaking power of state legislatures in the face of adverse claims by property owners.

II

The Court today dusts off the Contract Clause and thereby undermines the bipartisan policies of two States that mani-

[12] The fundamental soundness of the Authority's bonds is reflected in the ratings received from the principal financial surveys, Moody's and Standard & Poor's, following repeal of the covenant. The trial court found: "The bonds carried the same ["A"] rating prior to the enactment of the covenant, after it was enacted, after it was prospectively repealed, and after the [retroactive] repeal act of 1974." 134 N. J. Super., at 179, 338 A. 2d, at 864.

festly seek to further the legitimate needs of their citizens. The Court's analysis, I submit, fundamentally misconceives the nature of the Contract Clause guarantee.

One of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the needs and desires of those whom they represent. Crucial to this end is the assurance that new legislators will not automatically be bound by the policies and undertakings of earlier days. In accordance with this philosophy, the Framers of our Constitution conceived of the Contract Clause primarily as protection for economic transactions entered into by purely private parties, rather than obligations involving the State itself. See G. Gunther, Constitutional Law 604 (1975); B. Schwartz, A Commentary On the Constitution of the United States, pt. 2, The Rights of Property 274 (1965); B. Wright, The Contract Clause of the Constitution 15–16 (1938).[13] The Framers fully recognized that nothing would so jeopardize the legitimacy of a system of government that relies upon the ebbs and flows of politics to "clean out the rascals" than the possibility that those same rascals might perpetuate their policies simply by locking them into binding contracts.

Following an early opinion of the Court, however, that

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[13] One scholar for example, after undertaking extensive research into the history of the Constitutional Convention, concluded that there is no evidence that the Constitution's Framers perceived of the Contract Clause as applicable to public agreements. "[I]t is evident that all of them discussed the clause only in relation to private contracts, i. e., contracts between individuals." B. Wright, The Contract Clause of the Constitution 15 (1938). Moreover, "[a] careful search has failed to unearth any other statements even suggesting that the contract clause was intended to apply to other than private contracts." *Id.*, at 16. Indeed, Professor Wright found that only two antifederalists, neither of whom was a member of the Convention, ever suggested that the Clause would support "a broader meaning" encompassing public contracts, but "their interpretations were denied by members of the Convention, and the denials were not challenged." *Ibid.*

took the first step of applying the Contract Clause to public undertakings, *Fletcher* v. *Peck*, 6 Cranch 87 (1810), later decisions attempted to define the reach of the Clause consistently with the demands of our governing processes. The central principle developed by these decisions, beginning at least a century ago, has been that Contract Clause challenges such as that raised by appellant are to be resolved by according unusual deference to the lawmaking authority of state and local governments. Especially when the State acts in furtherance of the variety of broad social interests that came clustered together under the rubric of "police powers," see E. Freund, The Police Power (1904)—in particular, matters of health, safety, and the preservation of natural resources—the decisions of this Court pursued a course of steady return to the intention of the Constitution's Framers by closely circumscribing the scope of the Contract Clause.

This theme of judicial self-restraint and its underlying premise that a State always retains the sovereign authority to legislate in behalf of its people was commonly expressed by the doctrine that the Contract Clause will not even recognize efforts of a State to enter into contracts limiting the authority of succeeding legislators to enact laws in behalf of the health, safety, and similar collective interests of the polity [14]—in

[14] Parallel doctrines worked to the same end of freeing the States from contractual duties allegedly imposed by earlier legislators. For example, it has long been held that in applying the Contract Clause to government contracts, every ambiguity and gap is to be strictly construed in behalf of the State. "[I]n grants by the public, nothing passes by implication." *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 546 (1837). "Every reasonable doubt is to be resolved adversely [to the private party claiming under the contract]. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare." *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 666 (1878).

Along these lines, it is noteworthy that the state law of New Jersey itself raises serious doubts concerning the reasonableness of appellant's

short, that that State's police power is inalienable by contract. For example, in *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659 (1878), the Illinois General Assembly granted to a fertilizer company an 1867 corporate charter to run for 50 years. The corporation thereafter invested in a factory and depot on land which it owned within the area designated by the charter. Five years later, the village authorities of Hyde Park adopted an ordinance that rendered the company's charter valueless

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reliance on the covenant for permanent protection from later laws enacted by the state legislature. In a case involving an alleged impairment of a township's municipal bonds, *Hourigan* v. *North Bergen Township*, 113 N. J. L. 143, 149, 172 A. 193, 196 (1934), the State's highest court declared: "It is a well established doctrine that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals. While this power is subject to limitations in certain cases, there is wide discretion on the part of the legislature in determining what is and what is not necessary—a discretion which courts ordinarily will not interfere with." In my view, therefore, appellant should be held to have purchased the Authority's bonds subject to the knowledge that under New Jersey law the State's obligation was conditionally undertaken subject to reasonable future legislative action.

The record raises similiar doubts and ambiguities. Thus, State Senator Farley, who chaired the committee that inquired into the status of the Authority's bonds prior to enactment of the covenant, noted: "[W]e well appreciate that . . . we could not impair any obligation such as contracts of bond issues. Likewise, you [Commissioner Clancy of the Port Authority] as a lawyer know that *one legislature cannot bind the other involving policy five, ten, or twenty years hence.*" App. 89a (emphasis supplied). It may well be that appellant subjectively believed that the covenant was unimpeachable under state law. But given the doubts and hesitancies contained in the record, the principles established in earlier cases extending back to John Marshall should require that such "doubt is fatal to [appellant's] claim." *Fertilizing Co., supra*, at 666.

by prohibiting the transportation of offal within the village and forbidding the operation of a fertilizer factory within the village confines. This Court nonetheless rejected the contention that the new ordinance offended the Contract Clause:

> "We cannot doubt that the police power of the State was applicable and adequate to give an effectual remedy [to the nuisance]. That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. . . .
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> ". . . Pure air and the comfortable enjoyment of property are as much rights belonging to [the village residents] as the right of possession and occupancy. . . .
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> "The [company's] charter was a sufficient license until revoked; but we cannot regard it as a contract guaranteeing, in the locality originally selected, exemption for fifty years from the exercise of the police power of the State, however serious the nuisance might become in the future . . . ." *Id.*, at 667, 669, 670.

Two years later, this principle of the Contract Clause's subservience to the States' broad lawmaking powers was reasserted in another context. In 1867, the Mississippi Legislature entered into a contract with a company whereby the latter was chartered to operate a lottery within the State "in consideration of a stipulated sum in cash . . . ." The next year the State adopted a constitutional provision abolishing lotteries. The Court once again unhesitantly dismissed a challenge to this provision grounded on the Contract Clause, *Stone* v. *Mississippi*, 101 U. S. 814, 817–818 (1880):

> " 'Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make

such laws as they may deem proper in matters of police' . . . . No one denies . . . that [this legislative power] extends to all matters affecting the public health or the public morals."

Later cases continued to read the Contract Clause as qualified by the States' powers to legislate for the betterment of their citizens, while further expanding the range of permissible police powers. For example, in *Atlantic Coast Line R. Co.* v. *Goldsboro*, 232 U. S. 548 (1914), the State chartered and contracted with the plaintiff railway company to operate rail lines within the State. Pursuant to this contract, the railroad acquired in fee land for use as rights-of-way and similar transportation activities. The Court recognized that the charter was a binding contract, and that the company, in reliance on the agreement, had acquired land which it enjoys as "complete and unqualified" owner. *Id.*, at 556, 558. Yet, the Court brushed aside a constitutional challenge to subsequent ordinances that greatly circumscribed the railroad's activities on its own land:

> "For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise." *Id.*, at 558.

In perfect conformity with these earlier cases that recognized the States' broad authority to legislate for the welfare of their citizens, New Jersey and New York sought to repeal the 1962 covenant in furtherance of "admittedly important" interests, *ante*, at 29, in environmental protection, clean air, and safe and efficient transportation facilities. The States' policy of deploying excess tolls for the maintenance and ex-

pansion of rapid transit was not oppressively or capriciously chosen; rather, it squarely complies with the commands embodied by Congress in several contemporaneous national laws. *Supra*, at 36–37. By invalidating the 1974 New Jersey repeal—and, by necessity, like action by New York—the Court regrettably departs from the virtually unbroken line of our cases that remained true to the principle that all private rights of property, even if acquired through contract with the State, are subordinated to reasonable exercises of the States' lawmaking powers in the areas of health (*Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659 (1878); *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746 (1884)); environmental protection (*Hudson Water Co.* v. *McCarter*, 209 U. S. 349 (1908); *Manigault* v. *Springs*, 199 U. S. 473 (1905); cf. *Henderson Co.* v. *Thompson*, 300 U. S. 258, 267 (1937); *Illinois Central R. Co.* v. *Illinois*, 146 U. S. 387, 452–453 (1892)); and transportation (*New Orleans Pub. Serv.* v. *New Orleans*, 281 U. S. 682 (1930); *Erie R. Co.* v. *Public Util. Comm'rs*, 254 U. S. 394 (1921); *Denver & R. G. R. Co.* v. *Denver*, 250 U. S. 241 (1919); *Atlantic Coast Line R. Co.* v. *Goldsboro*, *supra*; *Northern Pac. R. Co.* v. *Duluth*, 208 U. S. 583 (1908); *Chicago, B. & Q. R. Co.* v. *Nebraska ex rel. Omaha*, 170 U. S. 57 (1898); *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556 (1894)). In its disregard of these teachings, the Court treats New Jersey's social and economic policies with lesser sensitivity than former Members of this Court who stressed the protection of contract and property rights. Even Mr. Justice Butler recognized that the Contract Clause does not interfere with state legislative efforts in behalf of its citizens' welfare unless such actions

> "are . . . clearly unreasonable and arbitrary . . . . [And in applying this standard] [u]ndoubtedly the city, acting as the arm of the State, has a wide discretion in determining what precautions in the public interest are necessary or appropriate under the circumstances." *New Orleans Pub. Serv.*, *supra*, at 686.

Thus, with at best a passing nod to the long history of judicial deference to state lawmaking in the face of challenges under the Contract Clause, see *ante*, at 23 n. 20, the Court today imposes severe substantive restraints on New Jersey's attempt to free itself from a contractual provision that it deems inconsistent with the broader interests of its citizens. Today's decision cannot be harmonized with our earlier cases by the simple expedient of labeling the covenant "purely financial," *ante*, at 25, rather than a forfeiture of "an essential attribute of [New Jersey's] sovereignty," *ante*, at 23. As either an analytical or practical matter, this distinction is illusory. It rests upon an analytical foundation that has long been discarded as unhelpful.[15] And as a

[15] Among other difficulties, the question-begging attempt to categorize inviolable legislation powers vis-à-vis the Contract Clause depends upon a conception of state sovereignty that is both simplistic and unpersuasive. We are told that the Contract Clause "does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty," *ante*, at 23, but in applying this principle, the Court finds that the States' "taxing and spending powers," unlike the power of eminent domain, lie outside this rule, *ante*, at 24. Before today, one might well have supposed that the States' authority to tax, spend money, and generally make basic financial decisions is among the most important of their governmental powers. Indeed, only last Term, this Court announced that a State's decision to pay its employees less than the minimum wage—a decision of far less importance to the citizens generally than efforts to derive funding for improving the facilities that directly and vitally affect their health and safety—is immune from federal regulation under the Commerce Clause, an authority previously thought to be virtually plenary in nature. The Court there reasoned that the minimum-wage decision falls within the sovereign powers of "States *qua* States." *National League of Cities* v. *Usery*, 426 U. S. 833, 847 (1976). One may rightfully feel unease that the Court is in the process of developing a concept of state sovereignty that is marked neither by consistency nor intuitive appeal.

In any event, in addition to resting on a most dubious conception of sovereignty, the Court's effort to demonstrate that the States are free to contract away their taxing and spending powers—and hence free "to enter into effective financial contracts" notwithstanding later exercises of the police power—must fail because it is untenable. While it is true that

purely practical matter, an interference with state policy is no less intrusive because a contract prohibits the State from resorting to the most realistic and effective financial method of preserving its citizens' legitimate interests in healthy and safe transportation systems rather than directly proscribing the States from exercising their police powers in this area. The day has long since passed when analysis under the Contract Clause usefully can turn on such formalistic differences. Cf. *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 438 (1934).

Nor is the Court's reading of earlier constitutional doctrine aided by cases where the Contract Clause was held to forestall state efforts intentionally to withhold from creditors the unpaid interest on, *Von Hoffman* v. *City of Quincy*, 4 Wall. 535 (1867), or principal of, *Louisiana ex rel. Hubert* v. *New Orleans*, 215 U. S. 170 (1909); *Wolff* v. *New Orleans*, 103 U. S. 358 (1881), outstanding bonded indebtedness. Beyond dispute, the Contract Clause has come to prohibit a State from embarking on a policy motivated by a simple desire to escape its financial obligations or to injure others through "the repudiation of debts or the destruction of contracts or the denial of means to enforce them." *Home Bldg. & Loan Assn.* v. *Blaisdell*, *supra*, at 439. Nor will the Constitution permit

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New Jersey v. *Wilson*, 7 Cranch 164 (1812) (Contract Clause precludes a legislature from repudiating a grant of tax exemption) has never explicitly been overruled, subsequent cases have almost uniformly avoided adherence to either its reasoning or holding. See, *e. g.*, *New York ex rel. Clyde* v. *Gilchrist*, 262 U. S. 94 (1923); *Seton Hall College* v. *South Orange*, 242 U. S. 100 (1916); *Rochester R. Co.* v. *Rochester*, 205 U. S. 236 (1907); *Wisconsin & M. R. Co.* v. *Powers*, 191 U. S. 379 (1903); *Morgan* v. *Louisiana*, 93 U. S. 217 (1876). These cases appreciate, as today's decision does not, that the operative consideration for constitutional purposes is not whether a contract can or cannot be branded as "financial." Rather, in adjudging the constitutionality of "an exercise of the sovereign authority of the State," *Seton Hall College*, *supra*, at 106—be it financial or otherwise—the Contract Clause tolerates reasonable legislative Acts in the service of the broader interests of the society generally.

a State recklessly to pursue its legitimate policies involving matters of health, safety, and the like with "studied indifference to the interests of the mortgagee or to his appropriate protection . . . ." *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56, 60 (1935). In this regard, the Court merely creates its own straw man when it characterizes the choice facing it today either as adopting its new, expansive view of the scope of the Contract Clause, or holding that the Clause "would provide no protection at all." *Ante*, at 26. The Constitution properly prohibits New Jersey and all States from disadvantaging their creditors without reasonable justification or in a spirit of oppression, and New Jersey claims no such prerogatives. But if a State, as here, manifestly acts in furtherance of its citizens' general welfare, and its choice of policy, even though infringing contract rights, is not "plainly unreasonable and arbitrary," *Denver & R. G. R. Co.* v. *Denver*, 250 U. S., at 244, our inquiry should end:

> "The question is . . . whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." *Home Bldg. & Loan Assn.* v. *Blaisdell*, *supra*, at 438.

The Court, however, stands the Contract Clause completely on its head, see *supra*, at 45, and both formulates and strictly applies a novel standard for reviewing a State's attempt to relieve its citizens from unduly harsh contracts entered into by earlier legislators: [16] Such "an impairment may be con-

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[16] The Court makes clear that it contemplates stricter judicial review under the Contract Clause when the government's own obligations are in issue, but points to no case in support of this multiheaded view of the scope of the Clause. See *ante*, at 25–26. As noted previously, see n. 13, *supra*, this position finds no support in the historical rationale for inclusion of the Contract Clause in the Constitution. And it is clear that the Court's citation to *Perry* v. *United States*, 294 U. S. 330 (1935), see *ante*, at 26 n. 25, offers no support for its rewriting of history. In that case, one of the *Gold Clause Cases*, Perry challenged the constitution-

stitutional if it is reasonable and necessary to serve an important public purpose." *Ante*, at 25. Not only is this apparently spontaneous formulation virtually assured of frustrating the understanding of court and litigant alike,[17] but it

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ality of a congressional enactment which authorized the redemption of outstanding United States gold bonds by payment of legal tender currency rather than " 'by the payment of 10,000 gold dollars each containing 25.8 grains of gold, .9 fine,' " 294 U. S., at 347, the value of the dollar in gold when the bonds were acquired. Perry complained that inflation had devalued the worth of legal tender with respect to gold and, therefore, claimed financial injury by the conversion. The Government defended its actions on the ground that the gold clause obstructed Congress' express power to "regulate the Value" of money, Art. I, § 8, and, accordingly, argued that Congress was free to repudiate the gold standard under that power. Although Perry ultimately was denied recovery, the Court found that the authority to "regulate the Value" of money, while permitting Congress "to control or interdict the contracts of private parties" with regard to the legal exchange rate, 294 U. S., at 350, did not include the power to repudiate the Government's own obligations, which were governed by entirely different constitutional provisions: *E. g.*, Congress may "borrow Money on the credit of the United States," Art. I, § 8, cl. 2, and "The validity of the public debt of the United States . . . shall not be questioned," Amdt. 14, § 4. Thus the differential standard in *Perry* emerged from the collision of competing grants of power to the Federal Government, and did not purport to suggest that the Contract Clause—or its federal counterpart, the Fifth Amendment—standing alone would produce different standards for reviewing governmental interference with public and private contractual obligations.

[17] The Court's newly announced standard of review, like all such formulations, can merely hope to suggest the direction that a court's inquiry should take, and the relative weight to be afforded a constitutional right. But particular words like "reasonable" and "necessary" also are fused with special meaning, for judges have long experience in applying such standards to constitutional contexts. Reasonableness generally has signified the most relaxed regime of judicial inquiry. See, *e. g.*, *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970) ("If the classification has some 'reasonable basis,' it does not offend the Constitution"). Contrariwise, the element of necessity traditionally has played a key role in the most penetrating mode of constitutional review. See *e. g.*, *Shapiro* v. *Thompson*, 394 U. S. 618, 634 (1969) (a classification which burdens

is wholly out of step with the modern attempts of this Court to define the reach of the Contract Clause when a State's own contractual obligations are placed in issue.

Mr. Justice Cardozo's opinion in *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56 (1935), is the prime exposition of the

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a fundamental constitutional right must be "necessary to promote a *compelling* governmental interest"). The Court's new test, therefore, represents a most unusual hybrid which manages to merge the two polar extremes of judicial intervention, see generally Gunther, Foreword: In Search of Evolving Doctrine on A Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972), into one synthesis. Plainly, courts are apt to face considerable confusion in wielding such a schizophrenic new instrument. And well they might, for until today one would have fairly thought that as a matter of common sense as well as doctrine, state policies that are "necessary to serve an important public purpose." *ante*, at 25, *a fortiori* would be "reasonable."

The Court, however, seems to discover new meanings in these terms. "Necessary" appears to comport with some notion of a less restrictive alternative. As applied by the Court in this instance, however, the less restrictive alternative bears no relationship to previous uses of that analytical tool when economic and social matters were involved. Thus, the Court does not actually inquire whether "the government can achieve the purposes of the challenged regulation equally effectively by one or more narrower regulations." Struve, The Less-Restrictive-Alternative Principle and Economic Due Process, 80 Harv. L. Rev. 1463 (1967). Rather, the Court concludes that an impairment of contract was not "necessary" because the Court apparently is able to hypothesize other means of achieving some or all of the State's objectives, even though these alternatives have long been deemed as secondary in importance, nn. 7, 8, *supra*, or arguably are unconstitutional, *ante*, at 30 n. 28. Under this approach, few, if any, Contract Clause cases in history that have deferred to state policymaking have been correctly decided. See *infra*, at 59.

The "reasonableness" test does no better. No longer does it mean that this Court will defer to the "reasonable judgments" of the authorized policymakers. *Knebel* v. *Hein*, 429 U. S. 288, 297 (1977). Instead, the Court appears to ask whether changed circumstances took the state legislature by surprise, *ante*, at 31–32. Again, I find no basis in this Court's prior cases for adopting such a constrictive view of that constitutional test. See *infra*, at 59–60.

modern view. As a relief measure for financially depressed local governments, Arkansas enacted a statute that greatly diminished the remedies available to creditors under their bonds. This resulted in a remedial scheme whereby creditors were "without an effective remedy" for a minimum of 6½ years, during which time the government's obligation to pay principal or interest was suspended. *Id.*, at 61. The Court invalidated the alteration in remedies. It did so, however, only after concluding that the challenged state law cut recklessly and excessively into the value of the creditors' bonds: "[W]ith studied indifference to the interests of the mortgagee or to his appropriate protection [the State has] taken from the mortgage the quality of an acceptable investment for a rational investor." *Id.*, at 60. "So viewed [the State's action is] seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security." *Id.*, at 62.

In the present case, the trial court expressly applied the *Kavanaugh* standard to New Jersey's repeal of the covenant, and properly found appellant's claim to be wanting in all material respects: In a detailed and persuasive discussion, the court concluded that neither New Jersey nor New York repealed the covenant with the intention of damaging their creditors' financial position. Rather, the States acted out of "vital interest[s]," for "[t]he passage of time and events between 1962 and 1974 satisfied the Legislatures of the two states that the public interest which the Port Authority was intended to serve could not be met within the terms of the covenant." 134 N. J. Super., at 194, 338 A. 2d, at 873. And the creditors' corresponding injury did not even remotely reach that proscribed in *Kavanaugh:* Not only have Authority bonds remained "an 'acceptable investment,'" but "[t]he claim that bondholder security has been materially impaired or destroyed by the repeal is simply not supported by the record." *Id.*, at 196, 338 A. 2d, at 874.

The Court, as I read today's opinion, does not hold that

the trial court erred in its application of the facts of this case to Mr. Justice Cardozo's formulation. Instead, it manages to take refuge in the fact that *Kavanaugh* left open the possibility that the test it enunciated may merely represent the " 'outermost limits' " of state authority. *Ante*, at 27. This, I submit, is a slender thread upon which to hang a belated revival of the Contract Clause some 40 years later. And, in any event, whatever opening remained after *Kavanaugh* was surely closed by Mr. Justice Frankfurter in *Faitoute Iron & Steel Co.* v. *City of Asbury Park*, 316 U. S. 502 (1942). Speaking for a unanimous Court, *id.*, at 515, he employed the precise constitutional standard established by Mr. Justice Cardozo seven years earlier, and upheld under the Contract Clause a New Jersey plan to reorganize the outstanding debt obligations held by creditors of Asbury Park. The Court thereby authorized an impairment of creditors' financial interests that was far more substantial than that involved here: In fact, the reorganization plan both extended the maturity date of the city's bonds by some 30 years and reduced the relevant coupon rate. Yet, rather than suggesting, as does the Court today, that New Jersey possessed lesser authority in the public interest to amend its own contracts than to alter private undertakings, the Court made clear that the State's powers are more expansive

> "[w]here . . . the respective parties are not private persons . . . but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject-matter of the contract is one which affects the safety and welfare of the public." *Id.*, at 514 n. 2, quoting *Chicago, B. & Q. R. Co.* v. *Nebraska*, 170 U. S., at 72.

In my view, the fact that New Jersey's repeal of the 1962 covenant satisfies the constitutional standards defined in *Kavanaugh* and *Faitoute* should, as the state courts concluded, terminate this litigation. But even were I to agree that the test

in *Kavanaugh* remains open to further refinement, that, I repeat, would hardly justify the Court's attempt to deploy the Contract Clause as an apparently unyielding instrument for policing the policies of New Jersey and New York. For such an interpretation plainly is at odds with the principles articulated in *Kavanaugh* and *Faitoute*, and subsequently reconfirmed by *El Paso* v. *Simmons*, 379 U. S. 497 (1965). The Court there considered a provision of Texas law that abolished an unlimited redemption period for landowners whose land had been defaulted to the State for nonpayment of interest, substituting a 5-year reinstatement period in its place. Unlike appellant here, Simmons at least could claim to have suffered tangible economic injury by virtue of the State's modification of his land-sale contract; indeed, as a result of that "impairment" he permanently lost property to the State. And, of course, Texas' "self-interest [was] at stake," *ante*, at 26, since it alone was the beneficiary of Simmons' curtailed right of reinstatement. Yet, properly applying the teachings of *Blaisdell*, *Kavanaugh*, and *Faitoute*, the Court had little difficulty in sustaining the measure as a means of removing clouds on title arising from pending reinstatement rights, 379 U. S., at 508–509 (citations omitted):

> "The *Blaisdell* opinion, which amounted to a comprehensive restatement of the principles underlying the application of the Contract Clause, makes it quite clear that '[n]ot only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect." . . .' 'Once we are in this domain of the reserve power of a State we must respect the "wide discretion on the part of the legislature in determining what is and what is not necessary." ' "

It need hardly be said that today's decision is markedly out of step with this deferential philosophy. The Court's willingness to uphold an impairment of contract—no matter how "technical" the injury—only on a showing of "necessity" *ante*, at 29–31, is particularly distressing, for this Court always will be able to devise abstract alternatives to the concrete action actually taken by a State. For example, in virtually every decided Contract Clause case, the government could have exercised the Court's "lesser alternative" of resorting to its powers of taxation as a substitute for modifying overly restrictive contracts. *Ante*, at 30 n. 29. Nothing, at least on the level of abstraction and conjecture engaged in by the Court today, prevented the appropriation of monies by Illinois to buy back or modify the corporate charter of the polluting fertilizer company in *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659 (1878); or by New Jersey to ensure the financial solvency of Asbury Park bonds, *Faitoute Iron & Steel Co.* v. *City of Asbury Park*, *supra;* or by Texas to purchase the unlimited redemption rights involved in *El Paso* v. *Simmons*, *supra*. Yet, in all these cases, modifications of state contracts were countenanced, and this Court did not feel compelled or qualified to instruct the state legislatures how best to pursue their business. In brief, these cases recognized that when economic matters are concerned, "the availability of alternatives does not render the [decisionmaker's] choice invalid." *Knebel* v. *Hein*, 429 U. S. 288, 294 (1977). State legislation "may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part." *Whalen* v. *Roe*, 429 U. S. 589, 597 (1977).

By the same token, if unforeseeability is the key to a "reasonable" decision, as the Court now contends, *ante*, at 32, almost all prior cases again must be repudiated. Surely the legislators of Illinois could not convincingly have claimed surprise because a fertilizer company polluted the air and transported fertilizer to its factory, *Fertilizing Co.* v. *Hyde*

Park, supra. Nor was it unforeseeable to Mississippi that a corporation which was expressly chartered to operate a lottery, in fact, did so, *Stone* v. *Mississippi*, 101 U. S. 814 (1880). And, of course, it was "not unknown," *ante*, at 32, to either debtor or creditor that a municipality's financial condition might falter as in *Faitoute Iron & Steel Co.* v. *City of Asbury Park, supra;* indeed, the foreseeability of that very risk inheres in the process of selecting an appropriate coupon rate. Yet, in all of these instances this Court did not construe the Contract Clause to prevent the States from confronting their real problems if and when their legislators came to believe that such action was warranted. It is not our province to contest the "reasonable judgments" of the duly authorized decisionmakers. *Knebel* v. *Hein, supra*, at 297.

Thus, as I had occasion to remark only last Term, the Court again offers a constitutional analysis that rests upon "abstraction[s] without substance," *National League of Cities* v. *Usery*, 426 U. S. 833, 860 (1976) (dissenting opinion). Given that this is the first case in some 40 years in which this Court has seen fit to invalidate purely economic and social legislation on the strength of the Contract Clause, one may only hope that it will prove a rare phenomenon, turning on the Court's particularized appraisal of the facts before it. But there also is reason for broader concern. It is worth remembering that there is nothing sacrosanct about a contract. All property rights, no less than a contract, are rooted in certain "expectations" about the sanctity of one's right of ownership. Compare *ante*, at 19–21, n. 17, with J. Bentham, Theory of Legislation c. 8 (1911 ed.). And other constitutional doctrines are akin to the Contract Clause in directing their protections to the property interests of private parties. Hence the command of the Fifth Amendment that "private property [shall not] be taken for public use, without just compensation" also "remains a part of our written Constitution." *Ante*, at 16. And during the heyday of economic due process associated with *Lochner* v. *New*

York, 198 U. S. 45 (1905), and similar cases long since discarded, see *Whalen* v. *Roe*, *supra*, at 597, this Court treated "the liberty of contract" under the Due Process Clause as virtually indistinguishable from the Contract Clause. G. Gunther Constitutional Law, 603–604 (1975); Hale, The Supreme Court and the Contract Clause: III, 57 Harv. L. Rev. 852, 890–891 (1944). In more recent times, however, the Court wisely has come to embrace a coherent, unified interpretation of all such constitutional provisions, and has granted wide latitude to "a valid exercise of [the States'] police powers," *Goldblatt* v. *Hempstead*, 369 U. S. 590, 592 (1962), even if it results in severe violations of property rights. See *Pittsburgh* v. *Alco Parking Corp.*, 417 U. S. 369 (1974); *Sproles* v. *Binford*, 286 U. S. 374, 388–389 (1932); *Miller* v. *Schoene*, 276 U. S. 272, 279–280 (1928); cf. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 (1955). If today's case signals a return to substantive constitutional review of States' policies, and a new resolve to protect property owners whose interest or circumstances may happen to appeal to Members of this Court, then more than the citizens of New Jersey and New York will be the losers.

III

I would not want to be read as suggesting that the States should blithely proceed down the path of repudiating their obligations, financial or otherwise. Their credibility in the credit market obviously is highly dependent on exercising their vast lawmaking powers with self-restraint and discipline, and I, for one, have little doubt that few, if any, jurisdictions would choose to use their authority "so foolish[ly] as to kill a goose that lays golden eggs for them," *Erie R. Co.* v. *Public Util. Comm'rs*, 254 U. S., at 410. But in the final analysis, there is no reason to doubt that appellant's financial welfare is being adequately policed by the political processes and the

bond marketplace itself.[18] The role to be played by the Constitution is at most a limited one. *Supra*, at 52–53. For this Court should have learned long ago that the Constitution—be it through the Contract or Due Process Clause—can actively intrude into such economic and policy matters only if my Brethren are prepared to bear enormous institutional and social costs. Because I consider the potential dangers of such judicial interference to be intolerable, I dissent.

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[18] And, of course, there is every reason to expect that appellant, with combined trust and fiduciary holdings of Authority bonds amounting to some $300 million, is not powerless in protecting its interests either before the state legislature or in the economic marketplace. Indeed, a myriad of sophisticated investors, investment banks, and market analysts regularly oversee the operation of the bond market and the affairs of municipalities which appear in search of credit. Accordingly, any city or State that enters the marketplace is well aware that, should it treat its creditors abusively, the market is apt to exact "justice" that is quicker and surer than anything that this Court can hope to offer. In brief, appellant is the paradigm of a litigant who is neither "discrete" nor "insular" in appealing for this Court's time or protection.

Syllabus

BLACKLEDGE, WARDEN, ET AL. *v.* ALLISON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75–1693. Argued February 22, 1977—Decided May 2, 1977

At the arraignment of respondent, who had been indicted in North Carolina for various state criminal offenses, he entered a guilty plea to a single count of attempted safe robbery. In response to two of various form questions that under then-applicable procedures were put by the trial judge to those entering guilty pleas, respondent acknowledged that he understood that he could be imprisoned for a minimum of 10 years to a maximum of life and that no one had made promises or threats to influence him to plead guilty. Without further questioning, the judge accepted the plea on an "Adjudication" form, which, *inter alia*, recited that respondent had pleaded guilty to attempted safe robbery "freely, understandingly and voluntarily," with full awareness of the consequences, and "without undue . . . compulsion . . . duress, [or] promise of leniency." At a sentencing hearing three days later respondent was sentenced to 17–21 years. After unsuccessfully exhausting a state collateral remedy, respondent sought a writ of habeas corpus in a Federal District Court, claiming that his guilty plea had been induced by the promise of his attorney, who presumably had consulted with the judge and Solicitor, that he would get only a 10-year sentence. He also stated that he was aware that he had been questioned by the judge before sentencing but thought that he was going to get only 10 years and had been instructed to answer the questions so that the court would accept the guilty plea. The District Court granted a motion to dismiss the petition, on the ground that the form conclusively showed that respondent had chosen to plead guilty knowingly, voluntarily, and with full awareness of the consequences. The Court of Appeals reversed, holding that respondent's allegation of a broken promise, as amplified by the explanation that his lawyer instructed him to deny the existence of any promises, was not foreclosed by his responses to the form questions and that he was entitled to an evidentiary hearing, at least in the absence of counteraffidavits conclusively proving the falsity of respondent's allegations. *Held:* In light of the nature of the record of the proceeding at which the guilty plea was accepted, and of the ambiguous status of the process of plea bargaining at the time the guilty plea was made, respondent's petition for a writ of habeas corpus should not have been summarily dismissed. Pp. 71–83.

(a) Although the plea or sentencing proceeding record constitutes a formidable barrier to a collateral attack on a guilty plea, that barrier is not insurmountable, and in administering the writ of habeas corpus federal courts cannot fairly adopt a *per se* rule excluding all possibility that a defendant's representations at the time of his guilty plea were so much the product of such factors as misunderstanding, duress, or misrepresentation as to make that plea a constitutionally inadequate basis for imprisonment. *Machibroda* v. *United States*, 368 U. S. 487; *Fontaine* v. *United States*, 411 U. S. 213. Pp. 71–75.

(b) Respondent's allegations were not so vague or conclusory as to warrant dismissal for that reason alone. He elaborated on his claim with specific factual allegations, indicating exactly what the terms of the promise were; when, where, and by whom it had been made; and the identity of a witness to its communication. Pp. 75–76.

(c) The North Carolina plea-bargaining procedure that was in effect at the time of respondent's arraignment reflected the atmosphere of secrecy that then characterized plea bargaining, whose legitimacy was not finally established until *Santobello* v. *New York*, 404 U. S. 257, which was decided not long before respondent's arraignment. There was no transcript of the proceeding but only a standard printed form, and there is no way of knowing if the trial judge deviated from the form or whether any statements were made regarding promised sentencing concessions; nor is there any record of the sentencing hearing. The form questions did nothing to dispel a defendant's belief that any plea bargain had to be concealed. Particularly, if, as respondent alleged, he was advised by counsel to conceal any plea bargain, his denial that promises had been made might have been mere courtroom ritual. Pp. 76–78.

(d) Though through such procedures as summary judgment, discovery, or expansion of the record, it may develop that a full evidentiary hearing is not required, respondent is "entitled to careful consideration and plenary processing of [his claim,] including full opportunity for presentation of the relevant facts." *Harris* v. *Nelson*, 394 U. S. 286, 298. Pp. 80–82.

533 F. 2d 894, affirmed.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 83. BURGER, C. J., concurred in the judgment. REHNQUIST, J., took no part in the consideration or decision of the case.

Richard N. League, Assistant Attorney General of North

Carolina, argued the cause for petitioners. With him on the briefs was *Rufus L. Edmisten*, Attorney General.

C. Frank Goldsmith, Jr., by appointment of the Court, 429 U. S. 957, argued the cause and filed a brief for respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent, Gary Darrell Allison, an inmate of a North Carolina penitentiary, petitioned a Federal District Court for a writ of habeas corpus. The court dismissed his petition without a hearing, and the Court of Appeals reversed, ruling that in the circumstances of this case summary dismissal was improper. We granted certiorari to review the judgment of the Court of Appeals.

I

Allison was indicted by a North Carolina grand jury for breaking and entering, attempted safe robbery, and possession of burglary tools. At his arraignment, where he was represented by court-appointed counsel, he initially pleaded not guilty. But after learning that his codefendant planned to plead guilty, he entered a guilty plea to a single count of attempted safe robbery, for which the minimum prison sentence was 10 years and the maximum was life. N. C. Gen. Stat. § 14–89.1 (1969).

In accord with the procedure for taking guilty pleas then in effect in North Carolina, the judge in open court read from a printed form 13 questions, generally concerning the defendant's understanding of the charge, its consequences, and the voluntariness of his plea. Allison answered "yes" or "no" to each question, and the court clerk transcribed those responses on a copy of the form, which Allison signed. So far as the record shows, there was no questioning beyond this routine; no inquiry was made of either defense counsel or prosecutor. Two questions from the form are of particular relevance to the issues before us: Question No. 8—"Do you

understand that upon your plea of guilty you could be imprisoned for as much as minimum [*sic*] of 10 years to life?" to which Allison answered "Yes"; and Question No. 11—"Has the Solicitor, or your lawyer, or any policeman, law officer or anyone else made any promises or threat to you to influence you to plead guilty in this case?" to which Allison answered "No."

The trial judge then accepted the plea by signing his name at the bottom of the form under a text entitled "Adjudication," which recited the three charges for which Allison had been indicted, that he had been fully advised of his rights, was in fact guilty, and pleaded guilty to attempted safe robbery "freely, understandingly and voluntarily," with full awareness of the consequences, and "without undue . . . compulsion . . . duress, [or] promise of leniency." [1] Three days later, at a

[1] The only record of the proceeding consists, therefore, of the executed form, which reads, in its entirety (Pet. for Cert. 10–13), as follows:

"File #71CrS 15073
"Film #.....
"State of North Carolina
"County of Alamance
"In the General Court of Justice
"Superior Court Division

"State of North Carolina
"vs.
"Gary Darrell Allison

"TRANSCRIPT OF PLEA

"The Defendant, being first duly sworn, makes the following answers to the questions asked by the Presiding Judge:

"1. Are you able to hear and understand my statements and questions? Answer: Yes
"2. Are you now under the influence of any alcohol, drugs, narcotics, medicines, or other pills? Answer: No
"3. Do you understand that you are charged with the felony of Attempted Safe Cracking? Answer: Yes
"4. Has the charge been explained to you, and are you ready for trial? Answer[:] Yes
"5. Do you understand that you have the right to plead not guilty and to be tried by a Jury? Answer: Yes

[*Footnote 1 is continued on p. 67*]

sentencing hearing, of which there is no record whatsoever, Allison was sentenced to 17–21 years in prison.

After unsuccessfully exhausting a state collateral remedy,

"6. How do you plead to the charge of Attempted Safe Cracking—Guilty, not Guilty, or nolo contendere? Answer: Guilty

"7. (a) Are you in fact guilty? (Omit if plea is nolo contendere) Answer: Yes

(b) (If applicable) Have you had explained to you and do you understand the meaning of a plea of nolo contendere? Answer: ....

"8. Do you understand that upon your plea of guilty you could be imprisoned for as much as minimum of 10 years to life? Answer: Yes

"9. Have you had time to subpoena witnesses wanted by you? Answer: Yes

"10. Have you had time to talk and confer with and have you conferred with your lawyer about this case, and are you satisfied with his services? Answer: Yes

"11. Has the Solicitor, or your lawyer, or any policeman, law officer or anyone else made any promises or threat to you to influence you to plead guilty in this case? Answer: No

"12. Do you now freely, understandingly and voluntarily authorize and instruct your lawyer to enter on your behalf a plea of guilty? Answer: Yes

"13. Do you have any questions or any statement to make about what I have just said to you? Answer: No

"I have read or heard read all of the above questions and answers and understand them, and the answers shown are the ones I gave in open Court, and they are true and correct.

"Gary Darrell Allison
"Defendant

"Sworn to and subscribed before me this 24th day of January, 1972.
"AOC-L Form 158 "Catherine Sykes, Ass't.
"Rev. 10/69 "Clerk Superior Court

"ADJUDICATION

"The undersigned Presiding Judge hereby finds and adjudges:

"I. That the defendant, Gary Darrell Allison, was sworn in open Court and the questions were asked him as set forth in the Transcript of Plea by the undersigned Judge, and the answers given thereto by said defendant are as set forth therein.

"II. That this defendant, was represented by attorney, M. Glenn

Allison filed a *pro se* petition in a Federal District Court seeking a writ of habeas corpus. The petition alleged:

> "[H]is guilty plea was induced by an unkept promise, and therefore was not the free and willing choice of the petitioner, and should be set aside by this Court. An unkept bargain which has induced a guilty plea is grounds for relief. *Santobello* v. *New York*, 404 U. S. 257, 267 (1971)." Pet. for Cert. 14.

The petition went on to explain and support this allegation as follows:

> "The petitioner was led to believe and did believe, by Mr. Pickard [Allison's attorney], that he Mr. N. Glenn

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Pickard, who was (court appointed); and the defendant through his attorney, in open Court, plead [*sic*] (guilty) to Attempted Safe Cracking as charged in the (warrant) (bill of indictment), of Breaking & Entering, Safe Burglary & Possession of Burglary Tools and in open Court, under oath further informs the Court that:

"1. He is and has been fully advised of his rights and the charges against him;

"2. He is and has been fully advised of the maximum punishment for said offense(s) charged, and for the offense(s) to which he pleads guilty;

"3. He is guilty of the offense(s) to which he pleads guilty;

"4. He authorizes his attorney to enter a plea of guilty to said charge(s);

"5. He has had ample time to confer with his attorney, and to subpoena witnesses desired by him;

"6. He is ready for trial;

"7. He is satisfied with the counsel and services of his attorney;

"And after further examination by the Court, the Court ascertains, determines and adjudges, that the plea of guilty, by the defendant is freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. It is, therefore, ORDERED that his plea of guilty be entered in the record, and that the Transcript of Plea and Adjudication be filed and recorded.

"This 24th day of January, 1972.

"Marvin Blount Jr.
"Judge Presiding"

Pickard had talked the case over with the Solicitor and the Judge, and that if the petitioner would plea[d] guilty, that he would only get a 10 year sentence of penal servitude. This conversation, where the petitioner was assured that if he plea[ded] guilty, he would only get ten years was witnessed by another party other than the petitioner and counsel.

. . . . .

"The petitioner believing that he was only going to get a ten year active sentence, allowed himself to be pled guilty to the charge of attempted safe robbery, and was shocked by the Court with a 17–21 year sentence.

. . . . .

"The petitioner was promised by his Attorney, who had consulted presumably with the Judge and Solicitor, that he was only going to get a ten year sentence, and therefore because of this unkept bargain, he is entitled to relief in this Court.

. . . . .

"The petitioner is aware of the fact that he was questioned by the trial Judge prior to sentencing, but as he thought he was only going to get ten years, and had been instructed to answer the questions, so that the Court would accept the guilty plea, this fact does not preclude him from raising this matter especially since he was not given the promised sentence by the Court.

. . . . .

". . . The fact that the Judge, said that he could get more, did not affect, the belief of the petitioner, that he was only going to get a ten year sentence."

The petitioner here, Warden Blackledge, filed a motion to dismiss and attached to it the "transcript" of the plea hearing, consisting of nothing more than the printed form filled in by the clerk and signed by Allison and the state-court judge. The motion contended that the form conclusively showed that

Allison had chosen to plead guilty knowingly, voluntarily, and with full awareness of the consequences. The Federal District Court agreed that the printed form "conclusively shows that [Allison] was carefully examined by the Court before the plea was accepted. Therefore, it must stand." Pet. for Cert. 18. Construing Allison's petition as alleging merely that his lawyer's prediction of the severity of the sentence turned out to be inaccurate, the District Court found no basis for relief and, accordingly, dismissed the petition.

One week later Allison filed a petition for rehearing. He contended that his statements during the guilty-plea proceeding in the state court were "evidentiary, but NOT conclusory" (App. 17); that if true the allegations in his petition entitled him to relief; and that he deserved a chance to establish their truth. Apparently impressed by these arguments and recognizing that Allison was alleging more than a mere "prediction" by his lawyer, the District Court referred the rehearing petition to a United States Magistrate, who directed Allison to submit evidence in support of his allegations. After an inconclusive exchange of correspondence, the Magistrate concluded that despite "ample opportunity" Allison had failed to comply with the directive, and recommended that the petition for rehearing be denied. The District Court accepted the Magistrate's recommendation and denied the petition. A motion for reconsideration was also denied.

The Court of Appeals for the Fourth Circuit reversed. It held that Allison's allegation of a broken promise, as amplified by the explanation that his lawyer instructed him to deny the existence of any promises, was not foreclosed by his responses to the form questions at the state guilty-plea proceeding. The appellate court reasoned that when a *pro se*, indigent prisoner makes allegations that, if proved, would entitle him to habeas corpus relief, he should not be required to prove his allegations in advance of an evidentiary hearing, at least in the absence of counter affidavits conclusively proving their

falsity. The case was therefore remanded for an evidentiary hearing. 533 F. 2d 894.

The petitioner warden sought review in this Court, 28 U. S. C. § 1254 (1), and we granted certiorari, 429 U. S. 814, to consider the significant federal question presented.

II

Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings.[2]

These advantages can be secured, however, only if dispositions by guilty plea are accorded a great measure of finality. To allow indiscriminate hearings in federal postconviction proceedings, whether for federal prisoners under 28 U. S. C. § 2255 or state prisoners under 28 U. S. C. §§ 2241–2254, would eliminate the chief virtues of the plea system—speed, economy, and finality. And there is reason for concern about that prospect. More often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea. If he succeeds in vacating the judgment of

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[2] See generally *Santobello* v. *New York*, 404 U. S. 257, 260–261; *Brady* v. *United States*, 397 U. S. 742, 751–752; ABA Project on Standards for Criminal Justice, Pleas of Guilty 1–3 (Approved Draft 1968) (hereinafter ABA Standards); ALI Model Code of Pre-Arraignment Procedure § 350.3, Commentary (1975) (hereinafter ALI Code).

conviction, retrial may be difficult. If he convinces a court that his plea was induced by an advantageous plea agreement that was violated, he may obtain the benefit of its terms. A collateral attack may also be inspired by "a mere desire to be freed temporarily from the confines of the prison." *Price* v. *Johnston*, 334 U. S. 266, 284–285; accord, *Machibroda* v. *United States*, 368 U. S. 487, 497 (Clark, J., dissenting).

Yet arrayed against the interest in finality is the very purpose of the writ of habeas corpus—to safeguard a person's freedom from detention in violation of constitutional guarantees. *Harris* v. *Nelson*, 394 U. S. 286, 290–291. "The writ of *habeas corpus* has played a great role in the history of human freedom. It has been the judicial method of lifting undue restraints upon personal liberty." *Price* v. *Johnston*, *supra*, at 269. And a prisoner in custody after pleading guilty, no less than one tried and convicted by a jury, is entitled to avail himself of the writ in challenging the constitutionality of his custody.

In *Machibroda* v. *United States*, *supra*, the defendant had pleaded guilty in federal court to bank robbery charges and been sentenced to 40 years in prison. He later filed a § 2255 motion alleging that his plea had been induced by an Assistant United States Attorney's promises that his sentence would not exceed 20 years, that the prosecutor had admonished him not to tell his lawyer about the agreement, and that the trial judge had wholly failed to inquire whether the guilty plea was made voluntarily before accepting it. This Court noted that the allegations, if proved, would entitle the defendant to relief, and that they raised an issue of fact that could not be resolved simply on the basis of an affidavit from the prosecutor denying the allegations. Because those allegations "related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light," 368 U. S., at 494–495, and were not so "vague [or] conclusory," *id.*, at

495, as to permit summary disposition, the Court ruled that the defendant was entitled to the opportunity to substantiate them at an evidentiary hearing.

The later case of *Fontaine* v. *United States*, 411 U. S. 213, followed the same approach. The defendant there, having waived counsel, had also pleaded guilty to federal bank robbery charges. Before accepting the plea, the District Judge addressed the defendant personally, and the defendant stated in substance "that his plea was given voluntarily and knowingly, that he understood the nature of the charge and the consequences of the plea, and that he was in fact guilty." *Id.*, at 213–214. The defendant later filed a § 2255 motion to vacate his sentence on the ground that his plea had been coerced "by a combination of fear, coercive police tactics, and illness, including mental illness." 411 U. S., at 214. The motion included supporting factual allegations, as well as hospital records documenting some of the contentions.

Although noting that in collaterally attacking a plea of guilty a prisoner "may not ordinarily repudiate" statements made to the sentencing judge when the plea was entered, the Court observed that no procedural device for the taking of guilty pleas is so perfect in design and exercise as to warrant a *per se* rule rendering it "uniformly invulnerable to subsequent challenge." *Id.*, at 215. Because the record of the plea hearing did not, in view of the allegations made, " 'conclusively show that the prisoner [was] entitled to no relief,' " 28 U. S. C. § 2255, the Court ruled that the prisoner should be given an evidentiary hearing.[3]

These cases do not in the least reduce the force of the original plea hearing. For the representations of the defend-

[3] *Fontaine* and *Machibroda* were by no means the first cases in which this Court held that postconviction collateral relief might be available to a person convicted after having pleaded guilty. See, *e. g.*, *Herman* v. *Claudy*, 350 U. S. 116; *Waley* v. *Johnston*, 316 U. S. 101; *Walker* v. *Johnston*, 312 U. S. 275.

ant, his lawyer, and the prosecutor at such a hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible. *Machibroda, supra,* at 495–496 (§ 2255); *Price* v. *Johnston, supra,* at 286–287 (§ 2243).[4]

What *Machibroda* and *Fontaine* indisputably teach, however, is that the barrier of the plea or sentencing proceeding record, although imposing, is not invariably insurmountable.[5]

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[4] The standards of §§ 2243 and 2255 differ somewhat in phrasing. Compare § 2243 (A state prisoner seeking a writ of habeas corpus is to be granted an evidentiary hearing "unless it appears from the application that the applicant . . . is not entitled thereto") with § 2255 (A federal prisoner moving for relief is to be granted a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief"). However, the remedy under § 2255 was designed to be "exactly commensurate" with the federal habeas corpus remedy, *Swain* v. *Pressley,* 430 U. S. 372, 381; *Hill* v. *United States,* 368 U. S. 424, 427; *United States* v. *Hayman,* 342 U. S. 205, 219, and has been construed in accordance with that design, *e. g., Sanders* v. *United States,* 373 U. S. 1, 6–14. See also Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1173, and n. 126 (1970).

Unlike federal habeas corpus proceedings, a motion under § 2255 is ordinarily presented to the judge who presided at the original conviction and sentencing of the prisoner. In some cases, the judge's recollection of the events at issue may enable him summarily to dismiss a § 2255 motion, even though he could not similarly dispose of a habeas corpus petition challenging a state conviction but presenting identical allegations. Cf. *Machibroda,* 368 U. S., at 495 ("Nor were the circumstances alleged of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection"). To this extent, the standard may be administered in a somewhat different fashion.

[5] See, *e. g., United States* v. *McCarthy,* 433 F. 2d 591, 593 (CA1); *United States* v. *LaVallee,* 319 F. 2d 308, 314 (CA2); *Trotter* v. *United States,* 359 F. 2d 419 (CA2); *United States* v. *Valenciano,* 495 F. 2d 585 (CA3); *Edwards* v. *Garrison,* 529 F. 2d 1374, 1377 (CA4); *Bryan* v.

In administering the writ of habeas corpus and its § 2255 counterpart, the federal courts cannot fairly adopt a *per se* rule excluding all possibility that a defendant's representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment.[6]

III

The allegations in this case were not in themselves so "vague [or] conclusory," *Machibroda*, 368 U. S., at 495, as to warrant dismissal for that reason alone.[7] Allison alleged as a ground for relief that his plea was induced by an unkept promise.[8] But he did not stop there. He proceeded to

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United States, 492 F. 2d 775, 778 (CA5); *Mayes* v. *Pickett*, 537 F. 2d 1080, 1082–1083 (CA9); *Jones* v. *United States*, 384 F. 2d 916, 917 (CA9); *United States* v. *Simpson*, 141 U. S. App. D. C. 8, 11, 436 F. 2d 162, 165. In citing these cases we do not necessarily approve the result in any of them.

[6] An analogy is to be found in the law of contracts. The parol evidence rule has as its very purpose the exclusion of evidence designed to repudiate provisions in a written integration of contractual terms. Yet even a written contractual provision declaring that the contract contains the complete agreement of the parties, and that no antecedent or extrinsic representations exist, does not conclusively bar subsequent proof that such additional agreements exist and should be given force. The provision denying the existence of such agreements, of course, carries great weight, but it can be set aside by a court on the grounds of fraud, mistake, duress, "or on some ground that is sufficient for setting aside other contracts." 3 A. Corbin, Contracts § 578, p. 403 (2d ed. 1960); see *id.*, at 405–407, and nn. 41, 43.

[7] See Advisory Committee Note to Rule 4, Rules Governing Habeas Corpus Cases (" '[N]otice' pleading is not sufficient, for the petition is expected to state facts that point to a 'real possibility of constitutional error' "), 28 U. S. C. App., p. 266 (1976 ed.).

[8] Allison's petition stated that his lawyer, "who had consulted presumably with the Judge and Solicitor," had promised that the maximum sentence to be imposed was 10 years. This allegation, in light of the other circumstances of this case, raised the serious constitutional question

elaborate upon this claim with specific factual allegations. The petition indicated exactly what the terms of the promise were; when, where, and by whom the promise had been made; and the identity of one witness to its communication. The critical question is whether these allegations, when viewed against the record of the plea hearing, were so "palpably incredible," *ibid.*, so "patently frivolous or false," *Herman* v. *Claudy*, 350 U. S. 116, 119, as to warrant summary dismissal. In the light of the nature of the record of the proceeding at which the guilty plea was accepted, and of the ambiguous status of the process of plea bargaining at the time the guilty plea was made, we conclude that Allison's petition should not have been summarily dismissed.

Only recently has plea bargaining become a visible practice accepted as a legitimate component in the administration of criminal justice. For decades it was a *sub rosa* process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges.[9] Indeed, it was not until our decision in *Santobello* v. *New York*, 404 U. S. 257, that lingering doubts about the legitimacy of the practice were finally dispelled.[10]

Allison was arraigned a mere 37 days after the *Santobello* decision was announced, under a North Carolina procedure that had not been modified in light of *Santobello* or earlier

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whether his guilty plea was knowingly and voluntarily made. See *Santobello* v. *New York*, 404 U. S. 257; *Brady* v. *United States*, 397 U. S. 742, 755.

[9] See, *e. g.*, Advisory Committee Notes to 1974 Amendment of Fed. Rule Crim. Proc. 11, 18 U. S. C. App., p. 1304 (1970 ed., Supp. V); ABA Standards, Commentary 60–64; ALI Code, § 350.5, Note and Commentary; President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 9, 12–13, 111, 115 (1967) (hereinafter Task Force Report).

[10] The *Santobello* opinion declared that plea bargaining was "an essential component" of the criminal process which, "[p]roperly administered, . . . is to be encouraged." 404 U. S., at 260.

decisions of this Court [11] recognizing the process of plea bargaining.[12] That procedure itself reflected the atmosphere of secrecy which then characterized plea bargaining generally. No transcript of the proceeding was made. The only record was a standard printed form. There is no way of knowing whether the trial judge in any way deviated from or supplemented the text of the form. The record is silent as to what statements Allison, his lawyer, or the prosecutor might have made regarding promised sentencing concessions. And there is no record at all of the sentencing hearing three days later, at which one of the participants might well have made a statement shedding light upon the veracity of the allegations Allison later advanced.

The litany of form questions followed by the trial judge at arraignment nowhere indicated to Allison (or indeed to the lawyers involved) that plea bargaining was a legitimate practice that could be freely disclosed in open court. Neither lawyer was asked to disclose any agreement that had been reached, or sentencing recommendation that had been promised. The process thus did nothing to dispel a defendant's belief that any bargain struck must remain concealed—a belief here allegedly reinforced by the admonition of Allison's lawyer himself that disclosure could jeopardize the agreement. Rather than challenging respondent's counsel's contention at oral argument in this Court that "at that time in North Carolina plea bargains were never disclosed in response to such a question on such a form," Tr. of Oral Arg. 25, counsel for the petitioners conceded at oral argument that "[t]hat form was a minimum inquiry." *Id.*, at 49.

Although "[l]ogically the general inquiry should elicit information about plea bargaining, . . . it seldom has in the

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[11] See *McMann* v. *Richardson*, 397 U. S. 759; *Brady* v. *United States*, *supra*.

[12] According to the petitioner's brief, the form of inquiry employed at Allison's arraignment dates from 1967.

past." Advisory Committee Notes to 1974 Amendment of Fed. Rule Crim. Proc. 11, 18 U. S. C. App., p. 1304 (1970 ed., Supp. V).[13] Particularly if, as Allison alleged, he was advised by counsel to conceal any plea bargain, his denial that any promises had been made might have been a courtroom ritual more sham than real.[14] We thus cannot conclude that the allegations in Allison's habeas corpus petition, when measured against the "record" of the arraignment, were so "patently false or frivolous" [15] as to warrant summary dismissal.[16]

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[13] See, *e. g.*, *United States* v. *McCarthy*, 433 F. 2d, at 593; *Walters* v. *Harris*, 460 F. 2d 988, 993 (CA4); *United States* v. *Williams*, 407 F. 2d 940, 947–949, and n. 13 (CA4); *Bryan* v. *United States*, 492 F. 2d, at 780–781; *Moody* v. *United States*, 497 F. 2d 359, 362–363, and n. 2 (CA7); *United States* v. *Tweedy*, 419 F. 2d 192, 193 (CA9); *Jones* v. *United States*, 423 F. 2d 252 (CA9); *White* v. *Gaffney*, 435 F. 2d 1241 (CA10); ABA Standards, Commentary 60–64; Task Force Report 9, 12–13, 111, 115; A. Trebach, The Rationing of Justice 159–160 (1964).

[14] See Advisory Committee Notes to 1974 Amendment of Fed. Rule Crim. Proc. 11, 18 U. S. C. App., p. 1304 (1970 ed., Supp. V); ABA Standards, Commentary 61–62; Task Force Report 111.

[15] There is another ground to support the view that the allegations were not wholly incredible. Allison was indicted on three separate charges. All three were listed in the printed arraignment form, but he pleaded guilty to only one of them; the other two may well have been dismissed pursuant to an agreement. And this is not a case in which there is a record of the sentencing proceedings, see, *e. g.*, *United States* v. *Tweedy*, *supra*; *Lynott* v. *United States*, 360 F. 2d 586 (CA3), or where delay by the prisoner in seeking postconviction relief, see, *e. g.*, *Raines* v. *United States*, 423 F. 2d 526, 528 (CA4); *United States* v. *Tweedy*, *supra*, at 195; see also *Machibroda* v. *United States*, 368 U. S., at 498–499 (Clark, J., dissenting), undercuts the credibility of his allegations.

[16] For the reasons stated in the text, the "finding" recorded on the printed form that Allison's plea was entered "understandingly and voluntarily, . . . without promise of leniency," see n. 1, *supra*, was not binding under 28 U. S. C. § 2254 (d) on the District Court. See, *e. g.*, *Edwards* v. *Garrison*, 529 F. 2d, at 1377–1378, n. 3. See also *Machibroda* v. *United States*, *supra*, at 494–495 ("The factual allegations [at issue] related primarily to purported occurrences outside the courtroom and upon which

North Carolina has recently undertaken major revisions of its plea-bargaining procedures, in part to prevent the very kind of problem now before us.[17] Plea bargaining is expressly legitimated. N. C. Gen. Stat. § 15A–1021, and Official Commentary (1975). The judge is directed to advise the defendant that courts have approved plea bargaining and he may thus admit to any promises without fear of jeopardizing an advantageous agreement or prejudicing himself in the judge's eyes. See Brief for Respondent, App. D. Specific inquiry about whether a plea bargain has been struck is then made not only of the defendant, but also of his counsel and the prosecutor. N. C. Gen. Stat. §§ 15A–1023 (a), (c) (1975). Finally, the entire proceeding is to be transcribed verbatim. § 15A–1026, as amended (Int. Supp. 1976).[18]

Had these commendable procedures been followed in the present case, Allison's petition would have been cast in a very different light. The careful explication of the legitimacy of plea bargaining, the questioning of both lawyers, and the verbatim record of their answers at the guilty-plea proceedings would almost surely have shown whether any bargain did

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the record could, therefore, cast no real light"); Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments, 38 U. Chi. L. Rev. 142, 152 (1970).

[17] In 1973, the North Carolina Legislature enacted a comprehensive set of procedures governing disposition by guilty plea and plea arrangement, modeled after the ALI Model Code of Pre-Arraignment Procedure, Art. 350 (Tent. Draft No. 5, 1972). One of the stated purposes of the reform was to allow "defendants to tell the truth in plea proceedings. They should not be expected to go before judges after plea negotiations and lie by saying no promises or agreements were made." Official Commentary to Art. 58, N. C. Gen. Stat. §§ 15A–1021 to 15A–1027 (1975). Appendices to the respondent's brief indicate that the form used by trial judges in conducting plea hearings has twice been amended since the passage of this legislation.

[18] These reforms are quite similar to those undertaken in the 1974 Amendment of Fed. Rule Crim. Proc. 11, as well as to the recommendations of the ABA Standards and the ALI Code.

exist and, if so, insured that it was not ignored.[19] But the salutary reforms recently implemented by North Carolina highlight even more sharply the deficiencies in the record before the District Court in the present case.[20]

This is not to say that every set of allegations not on its face without merit entitles a habeas corpus petitioner to an evidentiary hearing. As in civil cases generally, there exists a procedure whose purpose is to test whether facially adequate allegations have sufficient basis in fact to warrant plenary presentation of evidence. That procedure is, of course, the motion for summary judgment. Upon remand the warden will be free to make such a motion, supporting it with whatever proof he wishes to attach.[21] If he chooses to do so, Allison will then be required either to produce some contrary proof indicating that there is a genuine issue of fact to be

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[19] A principal purpose of the North Carolina statutory reforms was to permit quick disposition of baseless collateral attacks. Official Commentary, *supra*, n. 17 ("If the procedures of plea negotiation are on the record and accurately reflect the things (legitimately) done, the basis for later challenge is effectively minimized"). Indeed, a petitioner challenging a plea given pursuant to procedures like those now mandated in North Carolina will necessarily be asserting that not only his own transcribed responses, but those given by two lawyers, were untruthful. Especially as it becomes routine for prosecutors and defense lawyers to acknowledge that plea bargains have been made, such a contention will entitle a petitioner to an evidentiary hearing only in the most extraordinary circumstances.

[20] This is not to suggest that a plea of guilty entered pursuant to procedures like those in effect at Allison's arraignment is necessarily vulnerable to collateral attack. It is simply to say that procedures like those now in effect in North Carolina serve (1) to prevent the occurrence of constitutional errors in the arraignment process, and (2) to discourage the filing of baseless petitions for habeas corpus and facilitate speedy but fair disposition of those that are filed.

[21] Indeed, it would seem easier for the State than for an indigent, untutored prisoner to obtain affidavits from the principals, particularly given the potential availability of discovery, see n. 23, *infra*.

resolved by the District Court or to explain his inability to provide such proof. Fed. Rules Civ. Proc. 56 (e), (f).

Moreover, as is now expressly provided in the Rules Governing Habeas Corpus Cases, the district judge (or a magistrate to whom the case may be referred) [22] may employ a variety of measures in an effort to avoid the need for an evidentiary hearing. Under Rule 6,[23] a party may request and the judge may direct that discovery take place, and "there may be instances in which discovery would be appropriate [before an evidentiary hearing, and would show such a hearing] to be unnecessary . . . ." Advisory Committee note to Rule 6, Rules Governing Habeas Corpus Cases, 28 U. S. C.,

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[22] Title 28 U. S. C. §§ 636 (b)(2), (3) authorize magistrates to assist "a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions," and preliminarily to review "applications for posttrial relief made by individuals convicted of criminal offenses . . . ." Rule 10 of the newly promulgated Rules Governing Habeas Corpus Cases similarly authorizes performance by a magistrate of virtually all the duties of a district judge, except for the exercise of ultimate decisionmaking authority. See Advisory Committee Note to Rule 10, 28 U. S. C., p. 274 (1976 ed.); *Wingo* v. *Wedding*, 418 U. S. 461, 473–474.

[23] Rule 6 of the Rules Governing Habeas Corpus, entitled "Discovery," provides:

"(a) *Leave of court required.* A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a petitioner who qualifies for the appointment of counsel under 18 U. S. C. § 3006A (g).

"(b) *Requests for discovery.* Requests for discovery shall be accompanied by a statement of the questions, interrogatories, or requests for admission and a list of the documents, if any, sought to be produced.

"(c) *Expenses.* If the respondent is granted leave to take the deposition of the petitioner or any other person the judge may as a condition of taking it direct that the respondent pay the expenses of travel and subsistence and fees of counsel for the petitioner to attend the taking of the deposition."

p. 268 (1976 ed.). Under Rule 7,[24] the judge can direct expansion of the record to include any appropriate materials that "enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing." [25]

In short, it may turn out upon remand that a full evidentiary hearing is not required. But Allison is "entitled to careful consideration and plenary processing of [his claim,] including full opportunity for presentation of the relevant

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[24] Rule 7 of the Rules Governing Habeas Corpus Cases, entitled "Expansion of Record," provides:

"(a) *Direction for Expansion.* If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.

"(b) *Materials to be added.* The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

"(c) *Submission to opposing party.* In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness."

[25] There may be cases in which expansion of the record will provide "evidence against a petitioner's extra-record contentions . . . so overwhelming as to justify a conclusion that an [allegation of a dishonored plea agreement] does not raise a substantial issue of fact." *Moorhead* v. *United States*, 456 F. 2d 992, 996 (CA3). But before dismissing facially adequate allegations short of an evidentiary hearing, ordinarily a district judge should seek as a minimum to obtain affidavits from all persons likely to have firsthand knowledge of the existence of any plea agreement. See *Walters* v. *Harris*, 460 F. 2d, at 992. " 'When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive, but that is not to say they may not be helpful.' " Advisory Committee Note to Rule 7, Rules Governing Habeas Corpus Cases, 28 U. S. C., p. 269 (1976 ed.), quoting *Raines* v. *United States*, 423 F. 2d 526, 530 (CA4).

facts." *Harris* v. *Nelson*, 394 U. S., at 298. See Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321, 337–338 (1973).[26] Upon that understanding, the judgment of the Court of Appeals is affirmed.

It is so ordered.

THE CHIEF JUSTICE concurs in the judgment.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court, and write briefly only to emphasize the importance of finality to a system of justice.* Our traditional concern for "persons whom society has

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[26] The correspondence between the Magistrate and Allison pertaining to Allison's petition for rehearing, see *supra*, at 70, did not provide such an opportunity. The Magistrate directed Allison to obtain a notarized statement from his codefendant, who allegedly had heard Allison's attorney make the promise as to sentence. Allison was confined in prison and without legal assistance. The codefendant was confined in a different prison. In these circumstances, the Magistrate imposed upon Allison a novel and formless burden of supplying proof, without the benefit of compulsory process and without any intimation that dismissal would follow if that burden were not met. It can thus hardly be said that Allison was granted a "full opportunity for presentation of the relevant facts" or that his petition received "careful consideration and plenary processing."

*The importance of finality to the criminal defendant and to society was well put by Mr. Justice Harlan:

"Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Sanders* v. *United States*, 373 U. S. 1, 24–25 (1963) (dissenting opinion).

See also *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 256–266 (1973) (POWELL, J., concurring).

grievously wronged and for whom belated liberation is little enough compensation," *Fay* v. *Noia*, 372 U. S. 391, 441 (1963), has resulted in a uniquely elaborate system of appeals and collateral review, even in cases in which the issue presented has little or nothing to do with innocence of the accused. The substantial societal interest in both innocence and finality of judgments is subordinated in many instances to formalisms.

The case before us today is not necessarily an example of abuse of the system. It *is* an example, however, of how finality can be frustrated by failure to adhere to proper procedures at the trial court level. I do not prejudge the ultimate result in this case by saying that respondent's guilty plea may well have been made knowingly and voluntarily. The case is here, five years after respondent's conviction, and following review by the North Carolina courts, the United States District Court, and the Court of Appeals for the Fourth Circuit, primarily because the record before us leaves room for some doubt as to the reliability of the procedure followed with respect to the guilty plea. All that we have in the record, as a basis for testing the possible merit of respondent's petition, are answers to a printed form certified by the trial judge. We do not know whether anything was said by the judge, the prosecutor, or counsel for respondent, other than the questions read from the form and the monosyllabic answers by respondent. There was no transcript of the proceedings.

As the Court's opinion indicates, there is every reason to believe that if a procedure similar to that prescribed by the new North Carolina statute is followed, a contention such as that made by respondent will justify an evidentiary hearing "only in the most extraordinary circumstances." *Ante*, at 80 n. 19. If all participants in the process at the plea stage are mindful of the importance of adhering carefully to prescribed procedures and of preserving a full record thereof, the causes of justice and finality both will be served.

Syllabus

LINMARK ASSOCIATES, INC., ET AL. *v.* TOWNSHIP OF WILLINGBORO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 76-357. Argued March 2, 1977—Decided May 2, 1977

A township ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs for the purpose of stemming what the township perceived as the flight of white homeowners from a racially integrated community *held* to violate the First Amendment. *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council*, 425 U. S. 748. Pp. 91-98.

(a) The ordinance cannot be sustained on the ground that it restricts only one method of communication while leaving ample alternative communication channels open. The alternatives (primarily newspaper advertising and listing with real estate agents, which involve more cost and less autonomy than signs, are less likely to reach persons not deliberately seeking sales information, and may be less effective) are far from satisfactory. And the ordinance is not genuinely concerned with the place (front lawns) or the manner (signs) of the speech, but rather proscribes particular types of signs based on their content because the township fears their "primary" effect—that they will cause those receiving the information to act upon it. Pp. 93-94.

(b) Moreover, despite the importance of achieving the asserted goal of promoting stable, integrated housing, the ordinance cannot be upheld on the ground that it promotes an important governmental objective, since it does not appear that the ordinance was needed to achieve that objective and, in any event, the First Amendment disables the township from achieving that objective by restricting the free flow of truthful commercial information. Pp. 94-97.

535 F. 2d 786, reversed.

MARSHALL, J., delivered the opinion of the Court, in which all other Members joined except REHNQUIST, J., who took no part in the consideration or decision of the case.

John P. Hauch, Jr., argued the cause for petitioners. With him on the brief was *Thomas L. Earp.*

Myron H. Gottlieb argued the cause and filed a brief for respondents.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether the First Amendment permits a municipality to prohibit the posting of "For Sale" or "Sold" signs when the municipality acts to stem what it perceives as the flight of white homeowners from a racially integrated community.

Petitioner Linmark Associates, a New Jersey corporation, owned a piece of realty in the township of Willingboro, N. J. Petitioner decided to sell its property, and on March 26, 1974, listed it with petitioner Mellman, a real estate agent. To attract interest in the property, petitioners desired to place a "For Sale" sign on the lawn. Willingboro, however, narrowly limits the types of signs that can be erected on land in the township. Although prior to March 1974 "For Sale" and "Sold" signs were permitted subject to certain restrictions not at issue here, on March 18, 1974, the Township Council enacted Ordinance 5–1974, repealing the statutory authorization for such signs on all but model homes. Petitioners brought this action against both the township and the building inspector charged with enforcing the ban on "For Sale" signs, seeking declaratory and injunctive relief.[1] The District

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**Joel M. Gora* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Jack Greenberg, Charles Stephen Ralston,* and *Melvyn R. Leventhal* for the N. A. A. C. P. Legal Defense & Educational Fund, Inc.; by *Paul R. Donaldson* and *Donald K. Barclay* for the cities of Shaker Heights and Cleveland Heights, Ohio; by *Burton R. Shifman* for the city of Oak Park, Mich.; and by Housing Advocates, Inc.

[1] Respondents report that according to a deed on file in Burlington County, N. J., petitioner Linmark Associates' property was sold on April 21, 1976, while this case was pending in the Court of Appeals. Brief for Respondents 8 n. 2. This does not moot this case, however, since at

Court granted a declaration of unconstitutionality, but a divided Court of Appeals reversed, 535 F. 2d 786 (CA3 1976). We granted certiorari, 429 U. S. 938 (1976), and reverse the judgment of the Court of Appeals.

I

The township of Willingboro is a residential community located in southern New Jersey near Fort Dix, McGuire Air Force Base, and offices of several national corporations. The township was developed as a middle-income community by Levitt & Sons, beginning in the late 1950's. It is served by over 80 real estate agents.

During the 1960's Willingboro underwent rapid growth. The white population increased by almost 350%, and the nonwhite population rose from 60 to over 5,000, or from .005% of the population to 11.7%. As of the 1970 census, almost 44,000 people resided in Willingboro. In the 1970's, however, the population growth slowed; from 1970 to 1973, the latest year for which figures were available at the time of trial, Willingboro's population rose by only 3%. More significantly, the white population actually declined by almost 2,000 in this interval, a drop of over 5%, while the nonwhite population grew by more than 3,000, an increase of approximately 60%. By 1973, nonwhites constituted 18.2% of the township's population.

At the trial in this case respondents presented testimony from two real estate agents, two members of the Township Council, and three members of the Human Relations Commission, all of whom agreed that a major cause in the decline in

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least as to petitioner Mellman, the real estate agent, there plainly is an "immediate prospect," *Steffel* v. *Thompson*, 415 U. S. 452, 459–460 (1974), that he will desire to place "For Sale" signs on other property in Willingboro, and thus there remains a controversy "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941).

the white population was "panic selling"—that is, selling by whites who feared that the township was becoming all black, and that property values would decline. One real estate agent estimated that the reason 80% of the sellers gave for their decision to sell was that "the whole town was for sale, and they didn't want to be caught in any bind." App. in No. 75–1448 (CA3), pp. 219a–220a. Respondents' witnesses also testified that in their view "For Sale" and "Sold" signs were a major catalyst of these fears.

William Kearns, the Mayor of Willingboro during the year preceding enactment of the ordinance and a member of the Council when the ordinance was enacted, testified concerning the events leading up to its passage. *Id.*, at 183a–186a. According to Kearns, beginning at least in 1973 the community became concerned about the changing population. At a town meeting in February 1973, called to discuss "Willingboro, to sell or not to sell," a member of the community suggested that real estate signs be banned. The suggestion received the overwhelming support of those attending the meeting. Kearns brought the proposal to the Township Council, which requested the Township Solicitor to study it. The Council also contacted National Neighbors, a nationwide organization promoting integrated housing, and obtained the names of other communities that had prohibited "For Sale" signs. After obtaining a favorable report from Shaker Heights, Ohio, on its ordinance, and after receiving an endorsement of the proposed ban from the Willingboro Human Relations Commission, the Council began drafting legislation.

Rather than following its usual procedure of conducting a public hearing only after the proposed law had received preliminary Council approval, the Council scheduled two public meetings on Ordinance 5–1974. The first took place in February 1974, before the initial Council vote, and the second in March 1974, after the vote. At the conclusion of the second hearing, the ordinance was approved unanimously.

The transcripts of the Council hearings were introduced into evidence at trial. They reveal that at the hearings the Council received important information bearing on the need for and likely impact of the ordinance. With respect to the justification for the ordinance, the Council was told (a) that a study of Willingboro home sales in 1973 revealed that the turnover rate was roughly 11%, App. in No. 75–1448 (CA3), p. 89a; [2] (b) that in February 1974—a typical month—230 "For Sale" signs were posted among the 11,000 houses in the community, *id.*, at 94a, 37a; [3] and (c) that the Willingboro Tax Assessor had reported that "by and large the increased value of Willingboro properties was way ahead of . . . comparable communities." *Id.*, at 106a. With respect to the projected effect of the ordinance, several real estate agents reported that 30%–35% of their purchaser-clients came to them because they had seen one of the agent's "For Sale" or "Sold" signs, *id.*, at 33a, 47a, 49a, 57a,[4] and one agent estimated, based on his experience in a neighboring community that had already banned signs, that selling realty without signs takes twice as long as selling with signs, *id.*, at 42a.

The transcripts of the Council hearings also reveal that the hearings provided useful barometers of public sentiment toward the proposed ordinance. The Council was told, for

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[2] At the beginning of the first hearing, the then Mayor estimated that 1,100 houses are sold each year, a 10% turnover rate. App. in No. 75–1488 (CA3), p. 37a.

[3] Another real estate agent reported that on January 7, 1974, in the Twin Hills section of Willingboro, 32 signs were posted among the 920 houses. He further stated that during the preceding year, the highest number of signs in Twin Hills at any one time was 62. *Id.*, at 77a–78a.

At trial, one of respondents' real-estate-agent witnesses testified that he had surveyed the number of signs in August 1973 and found more than 230; he did not recall, however, how many signs were standing at that time. *Id.*, at 225a.

[4] At trial, petitioner Mellman corroborated this figure based on his own business. *Id.*, at 135a.

example, that surveys in two areas of the township found overwhelming support for the law, *id.*, at 29a, 84a.[5] In addition, at least at the second meeting, the citizens, who were not real estate agents and who spoke, favored the proposed ordinance by a sizable margin. Interestingly, however, at both meetings those defending the ordinance focused primarily on aesthetic considerations and on the effect of signs—and transiency generally—on property values. Few speakers directly referred to the changing racial composition of Willingboro in supporting the proposed law.

Although the ordinance had been in effect for nine months prior to trial, no statistical data were presented concerning its impact. Respondents' witnesses all agreed, however, that the number of persons selling or considering selling their houses because of racial fears had declined sharply. But several of these witnesses also testified that the number of sales in Willingboro had not declined since the ordinance was enacted. Moreover, respondents' real-estate-agent witnesses both stated that their business had increased by 25% since the ordinance was enacted, *id.*, at 164a, 226a, and one of these agents reported that the racial composition of his clientele remained unchanged, *id.*, at 160a.

The District Court did not make specific findings of fact. In the course of its opinion, however, the court stated that Willingboro "is to a large extent a transient community, partly due to its proximity to the military facility at Fort Dix and in part due to the numerous transfers of real estate." The court also stated that there was "no evidence" that whites were leaving Willingboro en masse as "For Sale" signs appeared, but "merely an indication that its residents are concerned that there may be a large influx of minority groups moving in to the town with the resultant effect being a reduc-

[5] One of the two "surveys" took the form of an effort by citizens in the Rittenhouse Park section of Willingboro to ban "For Sale" signs. That effort attracted the support of 70% of the homeowners in the section.

tion in property values." The Court of Appeals essentially accepted these "findings," although it found that Willingboro was experiencing "incipient" panic selling, 535 F. 2d, at 799, and that a "fear psychology [had] developed," *id.*, at 790.

II

A

The starting point for analysis of petitioners' First Amendment claim must be the two recent decisions in which this Court has eroded the "commercial speech" exception to the First Amendment. In *Bigelow* v. *Virginia*, 421 U. S. 809 (1975), decided less than two years ago, this Court for the first time expressed its dissatisfaction with the then-prevalent approach of resolving a class of First Amendment claims simply by categorizing the speech as "commercial." *Id.*, at 826. "Regardless of the particular label," we stated, "a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Ibid.* After conducting such an analysis in *Bigelow* we concluded that Virginia could not constitutionally punish the publisher of a newspaper for printing an abortion referral agency's paid advertisement which not only promoted the agency's services but also contained information about the availability of abortions.

One year later, in *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council*, 425 U. S. 748 (1976), we went further. Conceding that "[s]ome fragment of hope for the continuing validity of a 'commercial speech' exception arguably might have persisted because of the subject matter of the advertisement in *Bigelow*," *id.*, at 760, we held quite simply, that commercial speech is not "wholly outside the protection of the First Amendment," *id.*, at 761. Although recognizing that "[s]ome forms of commercial speech regulations"—such as regulation of false or misleading speech—"are surely per-

missible," *id.*, at 770, we had little difficulty in finding that Virginia's ban on the advertising of prescription drug prices by pharmacists was unconstitutional.[6]

Respondents contend, as they must, that the "For Sale" signs banned in Willingboro are constitutionally distinguishable from the abortion and drug advertisements we have previously considered. It is to the distinctions respondents advance that we now turn.

B

If the Willingboro law is to be treated differently from those invalidated in *Bigelow* and *Virginia Pharmacy Bd.*, it cannot be because the speakers—or listeners—have a lesser First Amendment interest in the subject matter of the speech that is regulated here. Persons desiring to sell their homes are just as interested in communicating that fact as are sellers of other goods and services. Similarly, would-be purchasers of realty are no less interested in receiving information about available property than are purchasers of other commodities in receiving like information about those commodities. And the societal interest in "the free flow of commercial information," *Virginia Pharmacy Bd., supra*, at 764, is in no way lessened by the fact that the subject of the commercial information here is realty rather than abortions or drugs.

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[6] The Court of Appeals did not have the benefit of *Virginia Pharmacy Bd.* when it issued its decision in this case. To some extent the court anticipated that decision, recognizing that the fact that "a communication is commercial in nature does not *ipso facto* strip the communication of its First Amendment protections." 535 F. 2d 786, 795 (CA3 1976). But the court premised its analysis on a sharp dichotomy between commercial and "pure" or noncommercial speech, *id.*, at 794, and concluded that commercial speech may be restricted if its "impact be found detrimental" by a municipality, and if "the limitation on any pure speech element [is] minimal," *id.*, at 795. After *Virginia Pharmacy Bd.* it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is "detrimental."

Respondents nevertheless argue that First Amendment concerns are less directly implicated by Willingboro's ordinance because it restricts only one method of communication. This distinction is not without significance to First Amendment analysis, since laws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether. Cf., *e. g.*, *Kovacs* v. *Cooper*, 336 U. S. 77 (1949); *Adderley* v. *Florida*, 385 U. S. 39 (1966); *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972). Respondents' effort to defend the ordinance on this ground is unpersuasive, however, for two reasons.

First, serious questions exist as to whether the ordinance "leave[s] open ample alternative channels for communication," *Virginia Pharmacy Bd.*, *supra*, at 771. Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers realistically are relegated—primarily newspaper advertising and listing with real estate agents—involve more cost and less autonomy than "For Sale" signs; cf. *Martin* v. *City of Struthers*, 319 U. S. 141, 146 (1943); *Kovacs* v. *Cooper*, *supra*, at 102–103 (Black, J., dissenting); are less likely to reach persons not deliberately seeking sales information, cf. *United States* v. *O'Brien*, 391 U. S. 367, 388–389 (1968) (Harlan, J., concurring); and may be less effective media for communicating the message that is conveyed by a "For Sale" sign in front of the house to be sold, cf. *Cohen* v. *California*, 403 U. S. 15, 25–26 (1971). The alternatives, then, are far from satisfactory.

Second, the Willingboro ordinance is not genuinely concerned with the place of the speech—front lawns—or the manner of the speech—signs. The township has not prohibited all lawn signs—or all lawn signs of a particular size or shape—in order to promote aesthetic values or any other value "unrelated to the suppression of free expression," *United*

States v. *O'Brien, supra,* at 377.[7] Nor has it acted to restrict a mode of communication that "intrudes on the privacy of the home, . . . makes it impractical for the unwilling viewer or auditor to avoid exposure," *Erznoznik* v. *City of Jacksonville,* 422 U. S. 205, 209 (1975), or otherwise reaches a group the township has a right to protect.[8] And respondents have not demonstrated that the place or manner of the speech produces a detrimental "secondary effect" on society, *Young* v. *American Mini Theatres,* 427 U. S. 50, 71 n. 34 (1976). Rather, Willingboro has proscribed particular types of signs based on their content because it fears their "primary" effect—that they will cause those receiving the information to act upon it. That the proscription applies only to one mode of communication, therefore, does not transform this into a "time, place, or manner" case. See, *e. g., Erznoznik* v. *City of Jacksonville, supra; Police Department of Chicago* v. *Mosley,* 408 U. S. 92 (1972); *Tinker* v. *Des Moines School Dist.,* 393 U. S. 503, 510 (1969). If the ordinance is to be sustained, it must be on the basis of the township's interest in regulating the content of the communication, and not on any interest in regulating the form.

C

Respondents do seek to distinguish *Bigelow* and *Virginia Pharmacy Bd.* by relying on the vital goal this ordinance serves: namely, promoting stable, racially integrated housing. There can be no question about the importance of achieving this goal. This Court has expressly recognized that substantial benefits flow to both whites and blacks from interracial

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[7] Accordingly, we do not decide whether a ban on signs or a limitation on the number of signs could survive constitutional scrutiny if it were unrelated to the suppression of free expression. See *Baldwin* v. *Redwood City,* 540 F. 2d 1360, 1368–1369 (CA9 1976); cf. *Markham Advertising Co.* v. *State,* 73 Wash. 2d 405, 439 P. 2d 248 (1968), appeal dismissed, 393 U. S. 316 (1969).

[8] Cf. *Capital Broadcasting Co.* v. *Mitchell,* 333 F. Supp. 582, 585–586 (DC 1971), summarily aff'd, 405 U. S. 1000 (1972).

association and that Congress has made a strong national commitment to promote integrated housing. *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205 (1972).

That this ordinance was enacted to achieve an important governmental objective, however, does not distinguish the case from *Virginia Pharmacy Bd.* In that case the State argued that its prohibition on prescription drug price advertising furthered the health and safety of state residents by preventing low cost, low quality pharmacists from driving reputable pharmacists out of business. We expressly recognized the "strong interest" of a State in maintaining "professionalism on the part of licensed pharmacists." 425 U. S., at 766. But we nevertheless found the Virginia law unconstitutional because we were unpersuaded that the law was necessary to achieve this objective, and were convinced that in any event, the First Amendment disabled the State from achieving its goal by restricting the free flow of truthful information. For the same reasons we conclude that the Willingboro ordinance at issue here is also constitutionally infirm.

The record here demonstrates that respondents failed to establish that this ordinance is needed to assure that Willingboro remains an integrated community.[9] As the District Court concluded, the evidence does not support the Council's apparent fears that Willingboro was experiencing a substantial incidence of panic selling by white homeowners. *A fortiori*, the evidence does not establish that "For Sale" signs in front of 2% of Willingboro homes were a major cause of panic selling. And the record does not confirm the town-

[9] As the District Court itself observed, its finding concerning the lack of panic selling distinguishes this case from *Barrick Realty, Inc.* v. *City of Gary*, 491 F. 2d 161 (CA7 1974), in which Gary, Indiana's, prohibition on "For Sale" signs was upheld on a record indicating that such signs were causing "whites to move *en masse* and blacks to replace them." *Id.*, at 163–164. We express no view as to whether *Barrick Realty* can survive *Bigelow* and *Virginia Pharmacy Bd.*

ship's assumption that proscribing such signs will reduce public awareness of realty sales and thereby decrease public concern over selling.[10]

The constitutional defect in this ordinance, however, is far more basic. The Township Council here, like the Virginia Assembly in *Virginia Pharmacy Bd.*, acted to prevent its residents from obtaining certain information. That information, which pertains to sales activity in Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families. The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave town. The Council's concern, then, was not with any commercial aspect of "For Sale" signs—with offerors communicating offers to offerees—but with the substance of the information communicated to Willingboro citizens. If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act "irrationally." *Virginia Pharmacy Bd.* denies government such sweeping

[10] While this assumption is certainly plausible, it is also possible that eliminating signs will cause homeowners to turn to other sources for information, so that their awareness of—and concern over—selling will be unaffected. Indeed, banning signs actually may fuel public anxiety over sales activity by increasing homeowners' dependence on rumor and surmise. See Laska & Hewitt, Are Laws Against "For Sale" Signs Constitutional? Substantive Due Process Revisited, 4 Real Estate L. J. 153, 160–162 (1975) (reporting on a study finding such an adverse effect from a ban on "For Sale" signs).

The fact that sales volume remained unchanged in Willingboro in the first nine months after the ordinance was enacted suggests that it did not affect public concern over selling, if that concern was a significant cause of housing turnover.

powers. As we said there in rejecting Virginia's claim that the only way it could enable its citizens to find their self-interest was to deny them information that is neither false nor misleading:

> "There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." 425 U. S., at 770.

Or as Mr. Justice Brandeis put it: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Whitney* v. *California*, 274 U. S. 357, 377 (1927) (concurring opinion).

Since we can find no meaningful distinction between Ordinance 5–1974 and the statute overturned in *Virginia Pharmacy Bd.*, we must conclude that this ordinance violates the First Amendment.

III

In invalidating this law, we by no means leave Willingboro defenseless in its effort to promote integrated housing. The township obviously remains free to continue "the process of education" it has already begun. It can give widespread publicity—through "Not for Sale" signs or other methods—to the number of whites remaining in Willingboro. And it surely can endeavor to create inducements to retain individuals who are considering selling their homes.

Beyond this, we reaffirm our statement in *Virginia Pharmacy Bd.* that the "commonsense differences between speech that does 'no more than propose a commercial transaction,' *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. [376,] 385 [(1973)], and other varieties . . . suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." 425 U. S., at 771–772, n. 24. Laws dealing with false or misleading signs, and laws requiring such signs to "appear in such a form, or include such additional information . . . as [is] necessary to prevent [their] being deceptive," *ibid.*, therefore, would raise very different constitutional questions. We leave those questions for another day, and simply hold that the ordinance under review here, which impairs "the flow of truthful and legitimate commercial information" is constitutionally infirm.

Reversed.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

Syllabus

ENVIRONMENTAL PROTECTION AGENCY *v.* BROWN, GOVERNOR OF CALIFORNIA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 75–909. Argued January 12, 1977—Decided May 2, 1977*

This Court will not review judgments of the Courts of Appeals invalidating transportation control plan regulations promulgated by the Administrator of the Environmental Protection Agency under the Clean Air Act and imposed on various States as elements of an implementation plan, where the federal parties have not only renounced an intent to seek review of the invalidation of certain regulations but have conceded that those remaining in controversy are invalid unless modified.

No. 75–909, 521 F. 2d 825 and 827; No. 75–960, 530 F. 2d 215; Nos. 75–1050 and 75–1055, 172 U. S. App. D. C. 311, 521 F. 2d 971, vacated and remanded.

Deputy Solicitor General Randolph argued the cause for petitioners in Nos. 75–909 and 75–960, for petitioner in No. 75–1055, and for respondent in No. 75–1050. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Taft, Harriet S. Shapiro, Edmund B. Clark, Bruce J. Chasan, Neil T. Proto, John E. Bonine,* and *Gerald K. Gleason. David G. Hawkins* argued the cause and filed briefs for Washington Area Bicyclist Assn., Inc., et al., respondents under this Court's Rule 21 (4), in support of petitioners in Nos. 75–909, 75–960, and 75–1055. *Joel S. Moskowitz,* Deputy

*Together with *Environmental Protection Agency* v. *Arizona et al.*, also on certiorari to the same court (see this Court's Rule 23 (5)); No. 75–960, *Environmental Protection Agency* v. *Maryland*, on certiorari to the United States Court of Appeals for the Fourth Circuit; and No. 75–1050, *Virginia ex rel. State Air Pollution Control Board* v. *Costle, Administrator, Environmental Protection Agency*, and No. 75–1055, *Costle, Administrator, Environmental Protection Agency* v. *District of Columbia et al.*, both on certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Attorney General of California, and *Henry R. Lord*, Deputy Attorney General of Maryland, argued the cause for respondents in Nos. 75–909, 75–960, and 75–1055, and for petitioner in No. 75–1050. With them on the brief were *Bruce E. Babbitt*, Attorney General of Arizona, and *Anthony B. Ching*, Assistant Attorney General; *Evelle J. Younger*, Attorney General of California, and *Mark I. Weinberger*, Deputy Attorney General; *Francis B. Burch*, Attorney General of Maryland, and *Edward M. Norton, Jr.*, Assistant Attorney General; *Andrew P. Miller*, Attorney General of Virginia, *Walter A. McFarlane*, Deputy Attorney General, and *J. Thomas Steger*, Assistant Attorney General; *John R. Risher, Jr.*, Corporation Counsel of the District of Columbia, *Louis P. Robbins*, Principal Assistant Corporation Counsel, and *John C. Salyer*, Assistant Corporation Counsel.†

PER CURIAM.

These cases arise under the Clean Air Act, as amended by the Clean Air Amendments of 1970, 84 Stat. 1676, 42 U. S. C. § 1857 *et seq.*, and raise questions concerning the authority of the Administrator of the Environmental Protection Agency to compel various types of implementation and enforcement actions by the States. Four separate decisions in the Courts of Appeals reviewed transportation control plans promulgated by the Administrator for several States which had previously failed to submit adequate plans of their own. Four petitions have been filed seeking review of those decisions which, with limited exceptions, invalidated the Administrator's transportation control plans which had been adopted in the form of regulations.

Those transportation control plans have a variety of aspects

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†*W. Bernard Richland* and *Alexander Gigante, Jr.*, filed a brief for the city of New York as *amicus curiae* urging reversal in part in Nos. 75–1050 and 75–1055, and affirmance in Nos. 75–909 and 75–960.

Ronald A. Zumbrun and *John H. Findley* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging affirmance in all cases.

which need not be discussed in great detail to explain our disposition of these cases. In general, they imposed upon the States the obligations (1) to develop an inspection and maintenance program pertaining to the vehicles registered in the affected Air Quality Control Regions, and to submit to the Administrator, by fixed deadlines, both a schedule of compliance and the operative regulations by which the program was to be run; (2) to develop various retrofit programs pertaining to several classes of older vehicles, in order to minimize several different types of emissions; (3) to designate and enforce preferential bus and carpool lanes, on streets sometimes specifically identified in the regulations and sometimes left to be chosen by the State; (4) to develop a program to monitor actual emissions as affected by the foregoing programs; and (5) to adopt certain other programs which varied from State to State.

The critical fact about all of the foregoing obligations was that they were imposed on the States, under 40 CFR § 52.23 (1976), as elements of an applicable implementation plan. A State's failure to carry out any of them would therefore not merely allow the Administrator to step in and carry them out himself under § 113 (a)(2) of the Clean Air Act,[1] but would,

[1] Section 113 (a)(2), 42 U. S. C. § 1857c–8 (a)(2), provides:

"Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as 'period of federally assumed enforcement'), the Administrator may enforce any requirement of such plan with respect to any person—

"(A) by issuing an order to comply with such requirement, or

"(B) by bringing a civil action under subsection (b) of this section."

in the view of each of the Courts of Appeals, render the State "in violation of any requirement of an applicable implementation plan" and therefore apparently subject to direct enforcement actions against it under the provisions of § 113 (a)(1), 42 U. S. C. § 1857c–8 (a)(1):

> "Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section."

Under dual challenges by the States that these regulations were not within the mandate of the Act, and that if they were they were in violation of the Constitution, the United States Courts of Appeals for the Ninth, Fourth, and District of Columbia Circuits struck them down. All of the courts rested on statutory interpretation, but noted also that serious constitutional questions might be raised if the statute were read as the United States argued it should be. *Brown* v. *EPA*, 521 F. 2d 827 (CA9 1975); *Arizona* v. *EPA*, 521 F. 2d 825 (CA9 1975); *District of Columbia* v. *Train*, 172 U. S. App. D. C. 311, 521 F. 2d 971 (1975); *Maryland* v. *EPA*, 530 F. 2d 215 (CA4 1975). The only substantial variation in the outcome of these decisions [2] was that the District of Columbia Circuit affirmed regulations requiring the creation of bus lanes, the purchase by the affected jurisdictions of a fixed

[2] Prior to the decision of the Ninth Circuit, a similar set of regulations pertaining to Pennsylvania had been upheld by the Third Circuit. *Pennsylvania* v. *EPA*, 500 F. 2d 246 (1974). That decision is not presently before the Court.

number of new buses, and the denial of registration to a vehicle whose owner is unable to produce a federal certificate of compliance, should a federal inspection program be instituted.

The Solicitor General's petitions from all three Courts of Appeals challenged them only insofar as they invalidated the regulations requiring state inspection and maintenance programs. In addition, we granted the petition for certiorari of the Commonwealth of Virginia on its challenge to the regulations which the District of Columbia Circuit had upheld. Prior to argument, the Solicitor General informed the Court that repeal of the bus purchase regulations was imminent, Reply Brief for Federal Parties 25,[3] and that issue was thereby effectively removed from the case. Thus the litigation has undergone a great deal of shrinkage since the decisions below due to the federal parties' exercise of their prerogative not to seek review of the invalidation of certain regulations.

But the federal parties have not merely renounced an intent to pursue certain specified regulations; they now appear to admit that those remaining in controversy are invalid unless modified in certain respects:

> "The Administrator . . . concedes the necessity of removing from the regulations all requirements that the States submit legally adopted regulations; the [Administrator's] regulations contain no requirement that the State adopt laws." Brief for Federal Parties 20 n. 14.

The federal parties' position now appears to be that, while the challenged transportation plans do not require the enactment of state *legislation*, they do now contain, and must be modified to eliminate, certain requirements that the State promulgate *regulations*. See Reply Brief for Federal Parties 14 n. 22.

We decline the federal parties' invitation to pass upon the EPA regulations, when the only ones before us are admitted to be in need of certain essential modifications. Such action on

[3] The regulations were officially rescinded on February 8, 1977. 42 Fed. Reg. 7957.

our part would amount to the rendering of an advisory opinion. For this Court to review regulations normally required to be first reviewed in the Court of Appeals, before such review is had, is extraordinary. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 584–585 (1952). For it to review regulations not yet promulgated, the final form of which has only been hinted at, would be wholly novel. See generally *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 417–419 (1942); *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 309–310 (1927).

The judgments of the respective Courts of Appeals are vacated, and the cases are remanded for consideration of mootness and such other proceedings as may be consistent with this opinion.

It is so ordered.

MR. JUSTICE STEVENS, dissenting.

The action the Court takes today is just as puzzling as the federal parties' position. Unless and until the Environmental Protection Agency rescinds the regulations in dispute, it is perfectly clear that the litigation is not moot. Moreover, an apparent admission that those regulations are invalid unless modified is not a proper reason for vacating the Court of Appeals judgments which invalidated the regulations.

If the Court is satisfied that the EPA Administrator will modify the regulations regardless of the outcome of the litigation, the writs of certiorari should be dismissed as improvidently granted. On the other hand, if the survival of the regulations is dependent on our disposition of these cases, we should address the merits and resolve the issues which have been fully briefed and argued. By vacating the judgments below, the Court hands the federal parties a partial victory as a reward for an apparent concession that their position is not supported by the statute. I respectfully dissent.

Syllabus

DIXON, SECRETARY OF STATE OF ILLINOIS *v.* LOVE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 75–1513. Argued March 1–2, 1977—Decided May 16, 1977

The Illinois Driver Licensing Law authorizes the Secretary of State of Illinois to suspend or revoke a driver's license without preliminary hearing upon a showing by his records or other sufficient evidence that the driver's conduct falls into any of 18 enumerated categories, one of which is that the driver has been repeatedly convicted of offenses against traffic laws to a degree indicating "lack of ability to exercise ordinary and reasonable care in the safe operation of a motor vehicle or disrespect for the traffic laws and the safety of other persons upon the highway." (§ 6–206 (a)(3)). Pursuant to this provision the Secretary issued a regulation requiring revocation in the event a driver's license is otherwise suspended three times within a 10-year period. Under the statutory scheme the Secretary must provide immediate written notice of a discretionary suspension or revocation and within 20 days of his receiving a written request from the licensee must schedule a full evidentiary hearing for a date "as early as practical," and his final decision is subject to judicial review. After the license of appellee, a truckdriver, became subject to suspension under another section of the statute, the Secretary ordered the license revoked under § 6–206 (a)(3) and the corresponding rule. Without requesting an administrative hearing, appellee brought this action challenging the constitutionality of § 6–206 (a)(3). A three-judge District Court, relying on *Bell* v. *Burson*, 402 U. S. 535, granted appellee relief on the ground that a license cannot constitutionally be revoked under the challenged statute until after a hearing is held to determine whether the licensee meets the statutory criteria. *Held:* The Illinois statute, as implemented by the Secretary's regulations, is constitutionally adequate under the Due Process Clause of the Fourteenth Amendment, as analyzed in *Mathews* v. *Eldridge*, 424 U. S. 319, 333. Pp. 112–116.

(a) The nature of the private interest involved here (the granted license to operate a motor vehicle) is not so great as to require a departure from "the ordinary principle . . . that something less than an evidentiary hearing is sufficient prior to adverse administrative action," *Eldridge*, *supra*, at 343, particularly in light of statutory provisions for

hardship and for holders of commercial licenses, who are those most likely to be affected by the deprival of driving privileges. P. 113.

(b) The risk of an erroneous deprivation absent a prior hearing is not great and additional procedures would not significantly reduce the number of erroneous deprivations. Here the Secretary's regulations make suspension and revocation decisions largely automatic, and appellee is asserting the right to appear at a prerevocation hearing merely to argue for leniency. Pp. 113–114.

(c) The requirement of a pretermination hearing in every case would impede the public interests of administrative efficiency as well as highway safety, which is promoted by the prompt removal of hazardous drivers. *Bell* v. *Burson*, *supra*, distinguished. Pp. 114–115.

Reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, POWELL, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, in which MARSHALL, J., joined, *post*, p. 116. BRENNAN, J., filed an opinion concurring in the result, *post*, p. 117. REHNQUIST, J., took no part in the consideration or decision of the case.

Patricia Rosen, Assistant Attorney General of Illinois, argued the cause for appellant. With her on the briefs were *William J. Scott*, Attorney General, and *Paul J. Bargiel*, *Stephen R. Swofford*, and *Mary Stafford*, Assistant Attorneys General.

James O. Latturner argued the cause for appellee. With him on the brief were *Alan M. Freedman*, *Richard J. Hess*, and *Allen L. Ray*.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The issue in this case is whether Illinois has provided constitutionally adequate procedures for suspending or revoking the license of a driver who repeatedly has been convicted of traffic offenses. The statute and administrative regulations provide for an initial summary decision based on official records, with a full administrative hearing available only after the suspension or revocation has taken effect.

I

The case centers on § 6–206 of the Illinois Driver Licensing Law (c. 6 of the Illinois Vehicle Code). The section is entitled "Discretionary authority to suspend or revoke license or permit." It empowers the Secretary of State to act "without preliminary hearing upon a showing by his records or other sufficient evidence" that a driver's conduct falls into any one of 18 enumerated categories. Ill. Rev. Stat., c. 95½, § 6–206 (a) (1975). Pursuant to his rulemaking authority under this law, § 6–211 (a),[1] the Secretary has adopted administrative regulations that further define the bases and procedures for discretionary suspensions. These regulations generally provide for an initial summary determination based on the individual's driving record.[2] The Secretary has established a comprehensive system of assigning "points" for various kinds of traffic offenses, depending on severity, to provide an objective means of evaluating driving records.

One of the statutorily enumerated circumstances justifying

[1] Section 6–211 (a): "The Secretary of State shall administer the provisions of this Chapter and may make and enforce rules and regulations relating to its administration."

[2] Rule 6–206 (a) (1975) provides in part:

"The Secretary of State is authorized to exercise discretionary authority to suspend or revoke the license or permit of any person without a preliminary hearing, or to decline to suspend or revoke such driving privileges. In making a determination of the action to be taken, the Secretary of State shall take into consideration the severity of the offense and conviction, the number of offenses and convictions, and prior suspensions or revocations on the abstract of the driver's record. The Secretary may also take into consideration the points accumulated by the driver and noted on his driving record.

"For the purpose of this Rule and its companion rules, a conviction is the final adjudication of 'guilty' by a court of competent jurisdiction, either after a bench trial, trial by jury, plea of guilty, order of forfeiture, or default, as reported to the Secretary of State, and the Secretary of State is not authorized to consider or inquire into the facts and circumstances surrounding the conviction."

license suspension or revocation is conviction of three moving traffic offenses within a 12-month period. § 6–206 (a)(2).[3] This is one of the instances where the Secretary, by regulation, has provided a method for determining the sanction according to the driver's accumulated "points." [4]

Another circumstance, specified in the statute, supporting suspension or revocation is where a licensee

> "[h]as been repeatedly involved as a driver in motor vehicle collisions or has been repeatedly convicted of

[3] The statute authorizes suspension or revocation where a licensee "[h]as been convicted of not less than 3 offenses against traffic regulations governing the movement of vehicles with the exception of those offenses excluded under the provisions of Section 6–204 (2), committed within any 12 month period so as to indicate the disrespect for traffic laws and a disregard for the safety of other persons on the highways; conviction upon 3 charges of violation of Section 11–601 of this Act committed within a period of 12 months shall be deemed grounds for the revocation or suspension of a license or permit under this Section, provided that no such revocation or suspension shall be entered more than 6 months subsequent to the date of conviction of the 3rd offense." Ill. Rev. Stat. c. 95½, § 6–206 (a)(2) (1975).

[4] Rule 6–206 (a)2 (1975) provides:

"A person who has been convicted of three (3) or more offenses against traffic regulations, governing the movement of vehicles, with the exception of those offenses excluded under provisions of Section 6–204 (2) and whose violations have occurred within a twelve (12) month period may be suspended as follows:

"Number of points	Action
20 to 44	Suspension up to 2 months
45 to 74	Suspension up to 3 months
75 to 89	Suspension up to 6 months
90 to 99	Suspension up to 9 months
100 to 109	Suspension up to 12 months
Over 110	Revocation for not less than 12 months.

"A person who has accumulated sufficient points to warrant a second suspension within a 10-year period may be either suspended or revoked,

offenses against laws and ordinances regulating the movement of traffic, to a degree which indicates lack of ability to exercise ordinary and reasonable care in the safe operation of a motor vehicle or disrespect for the traffic laws and the safety of other persons upon the highway." § 6–206 (a)(3).

Here again the Secretary has limited his broad statutory discretion by an administrative regulation. This regulation allows suspension or revocation, where sufficient points have been accumulated to warrant a second suspension within a 5-year period.[5] The regulation concludes flatly: "A person who has been suspended thrice within a 10 year period shall be revoked."

Section 6–206 (c)(1) [6] requires the Secretary "immediately" to provide written notice of a discretionary suspension or revocation under this statute, but no prior hearing is required. Within 20 days of his receiving a written request from the licensee, the Secretary must schedule a full evidentiary hear-

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depending on the number of points. In the event of a second suspension in the 10-year period, the length of suspension, determined by the point total, is doubled to arrive at the type and duration of action."

[5] Rule 6–206 (a)3 (1975) provides:

"A person repeatedly involved in collisions or convictions to a degree which indicates the lack of ability to exercise ordinary and reasonable care in the safe operation of a motor vehicle, or whose record indicates disrespect for traffic laws and the safety of other persons on the highway, and who has accumulated sufficient points to warrant a second suspension within a 5 year period, may either be suspended or revoked by the Secretary of State, based upon the number of points in his record. A person who has been suspended thrice within a 10 year period shall be revoked."

[6] Section 6–206 (c)(1): "Upon suspending or revoking the license or permit of any person as authorized in this Section, the Secretary of State shall immediately notify such person in writing of the order revoking or suspending the license or permit. Such notice to be deposited in the United States mail, postage prepaid, to the last known address of such person."

ing for a date "as early as practical" in either Sangamon County or Cook County, as the licensee may specify. § 2–118 (a). The final decision of the Secretary after such hearing is subject to judicial review in the Illinois courts. § 2–118 (e). In addition, a person whose license is suspended or revoked may obtain a restricted permit for commercial use or in case of hardship. §§ 6–206 (c) (2) and (3).[7]

II

Appellee Love, a resident of Chicago, is employed as a truck-driver. His license was suspended in November 1969, under § 6–206 (a) (2), for three convictions within a 12-month period. He was then convicted of a charge of driving while his license was suspended, and consequently another suspension was imposed in March 1970 pursuant to § 6–303 (b). Appellee received no further citation until August 1974, when he was arrested twice for speeding. He was convicted of both charges and then received a third speeding citation in February 1975. On March 27, he was notified by letter that he would lose his driving privileges if convicted of a third offense. On March 31 appellee was convicted of the third speeding charge.

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[7] The statutory provision regarding commercial licenses provides that a suspension shall not deny "a person's license to drive a commercial vehicle only as an occupation . . . unless 5 offenses were committed, at least 2 of which occurred while operating a commercial vehicle in connection with his regular occupation." The statute places the burden on the commercial driver whose license is suspended to submit an affidavit to the Secretary within 25 days, setting forth facts establishing his eligibility for relief under this section. A commercial driver may obtain the same relief by requesting an administrative hearing in lieu of submitting an affidavit. In any event, the driver must return his license to the Secretary and in its place is issued a permit to drive only a commercial vehicle in his regular occupation. § 6–206 (c) (2).

Any driver whose license is suspended or revoked, in order to "relieve undue hardship," may apply for a restricted permit to drive between his residence and his place of employment "or within other proper limits." § 6–206 (c) (3).

On June 3, appellee received a notice that his license was revoked effective June 6.[8] The stated authority for the revocation was § 6–206 (a)(3); the explanation, following the language of the statute, was:

> "This action has been taken as a result of: Your having been repeatedly convicted of offenses against laws and ordinances regulating the movement of traffic, to a degree which indicates disrespect for the traffic laws." App. 13.

Appellee, then aged 25, made no request for an administrative hearing. Instead, he filed this purported class action [9] on June 5 against the Illinois Secretary of State in the United States District Court for the Northern District of Illinois. His complaint sought a declaratory judgment that § 6–206 (a)(3) was unconstitutional, an injunction against enforcement of the statute, and damages. Appellee's application for a temporary restraining order was granted on condition that he apply for a hardship driving permit. He applied for that permit on June 10, and it was issued on July 25.

A three-judge District Court was convened to consider appellee's claim that the Illinois statute was unconstitutional. On cross-motions for summary judgment, the court held that a license cannot constitutionally be suspended or revoked under § 6–206 (a)(3) until after a hearing is held to determine whether the licensee meets the statutory criteria of "lack of ability to exercise ordinary and reasonable care in the safe operation of a motor vehicle or disrespect for the traffic laws

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[8] Appellee's March speeding conviction was his third within a 12-month period, and thus § 6–206 (a)(2) authorized suspension of his license. That suspension, however, would have been appellee's third within a 10-year period. The Secretary therefore proceeded directly under Rule 6–206 (a)3, which makes revocation mandatory under such circumstances. The District Court treated this procedure as functionally equivalent to suspension under § 6–206 (a)(2), followed by mandatory revocation under Rule 6–206 (a)3. See App. 20 n. 2.

[9] The class was never certified.

and the safety of other persons upon the highway." The court regarded such a prior hearing as mandated by this Court's decision in *Bell* v. *Burson*, 402 U. S. 535 (1971). Accordingly, the court granted judgment for appellee and enjoined the Secretary of State from enforcing § 6–206 (a)(3). The Secretary appealed, and we noted probable jurisdiction *sub nom. Howlett* v. *Love*, 429 U. S. 813 (1976).

III

It is clear that the Due Process Clause applies to the deprivation of a driver's license by the State:

> "Suspension of issued licenses . . . involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Bell* v. *Burson*, 402 U. S., at 539.

It is equally clear that a licensee in Illinois eventually can obtain all the safeguards procedural due process could be thought to require before a discretionary suspension or revocation becomes final. Appellee does not challenge the adequacy of the administrative hearing, noted above, available under § 2–118. The only question is one of timing. This case thus presents an issue similar to that considered only last Term in *Mathews* v. *Eldridge*, 424 U. S. 319, 333 (1976), namely, "the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter." We may analyze the present case, too, in terms of the factors considered in *Eldridge*:

> "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and

probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*, at 335.

The private interest affected by the decision here is the granted license to operate a motor vehicle. Unlike the social security recipients in *Eldridge*, who at least could obtain retroactive payments if their claims were subsequently sustained, a licensee is not made entirely whole if his suspension or revocation is later vacated. On the other hand, a driver's license may not be so vital and essential as are social insurance payments on which the recipient may depend for his very subsistence. See *Goldberg* v. *Kelly*, 397 U. S. 254, 264 (1970). The Illinois statute includes special provisions for hardship and for holders of commercial licenses, who are those most likely to be affected by the deprival of driving privileges. See n. 7, *supra*. We therefore conclude that the nature of the private interest here is not so great as to require us "to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action." *Mathews* v. *Eldridge*, 424 U. S., at 343. See *Arnett* v. *Kennedy*, 416 U. S. 134 (1974).

Moreover, the risk of an erroneous deprivation in the absence of a prior hearing is not great. Under the Secretary's regulations, suspension and revocation decisions are largely automatic. Of course, there is the possibility of clerical error, but written objection will bring a matter of that kind to the Secretary's attention. In this case appellee had the opportunity for a full judicial hearing in connection with each of the traffic convictions on which the Secretary's decision was based. Appellee has not challenged the validity of those convictions or the adequacy of his procedural rights at the time they were determined. Tr. of Oral Arg. 41, 47. Since appel-

lee does not dispute the factual basis for the Secretary's decision, he is really asserting the right to appear in person only to argue that the Secretary should show leniency and depart from his own regulations.[10] Such an appearance might make the licensee feel that he has received more personal attention, but it would not serve to protect any substantive rights. We conclude that requiring additional procedures would be unlikely to have significant value in reducing the number of erroneous deprivations.

Finally, the substantial public interest in administrative efficiency would be impeded by the availability of a pretermination hearing in every case. Giving licensees the choice thus automatically to obtain a delay in the effectiveness of a suspension or revocation would encourage drivers routinely to request full administrative hearings. See *Mathews* v. *Eldridge*, 424 U. S., at 347. Far more substantial than the administrative burden, however, is the important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard. See *Perez* v. *Campbell*, 402 U. S. 637, 657, 671 (1971) (opinion concurring in part and dissenting in part). This factor fully distinguishes *Bell* v. *Burson*, *supra*, where the "only purpose" of the Georgia statute there under consideration was "to obtain security from which to pay any judgments against the licensee resulting from the accident." 402 U. S., at 540.[11] In contrast, the Illinois statute at

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[10] Appellee also contends that a prior hearing would avoid erroneous deprivation of a license where the commercial driver or hardship exceptions are applicable. See n. 7, *supra*. It is clear, however, that these statutory provisions contemplate relief only after the initial decision to suspend or revoke is made, and the licensee has the burden of demonstrating his eligibility for the relief. An initial suspension or revocation, therefore, is not "erroneous" even if the licensee subsequently qualifies for relief as a commercial driver or hardship case.

[11] Since *Bell* v. *Burson* was decided, courts have sustained suspension or revocation of driving privileges, without prior hearing, where earlier con-

issue in the instant case is designed to keep off the roads those drivers who are unable or unwilling to respect traffic rules and the safety of others.

We conclude that the public interests present under the circumstances of this case are sufficiently visible and weighty for the State to make its summary initial decision effective without a predecision administrative hearing.

The present case is a good illustration of the fact that procedural due process in the administrative setting does not always require application of the judicial model. When a governmental official is given the power to make discretionary decisions under a broad statutory standard, case-by-case decisionmaking may not be the best way to assure fairness. Here the Secretary commendably sought to define the statutory standard narrowly by the use of his rulemaking authority.[12] The decision to use objective rules in this case provides drivers with more precise notice of what conduct will be sanctioned and promotes equality of treatment among similarly situated drivers. The approach taken by the District Court would have the contrary result of reducing the fairness of the system, by requiring a necessarily subjective inquiry in each case as to a driver's "disrespect" or "lack of ability to exercise ordinary and reasonable care."

The second count of appellee's complaint challenged § 6–206 (a)(3) on the grounds of vagueness and inadequacy of standards. The three-judge court did not reach the issue.

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victions were on the record. See, *e. g.*, *Cox* v. *Hjelle*, 207 N. W. 2d 266, 269–270 (N. D. 1973); *Stauffer* v. *Weedlun*, 188 Neb. 105, 195 N. W. 2d 218, appeal dismissed, 409 U. S. 972 (1972); *Horodner* v. *Fisher*, 38 N. Y. 2d 680, 345 N. E. 2d 571, appeal dismissed, 429 U. S. 802 (1976); *Wright* v. *Malloy*, 373 F. Supp. 1011, 1018–1019 (Vt.), summarily aff'd, 419 U. S. 987 (1974); *Scott* v. *Hill*, 407 F. Supp. 301, 304 (ED Va. 1076).

[12] See K. Davis, Discretionary Justice, c. III, 52–96 (1969). The promulgation of rules may be of particular value when it is necessary for administrative decisions to be made summarily. See Freedman, Summary Action by Administrative Agencies, 40 U. Chi. L. Rev. 1, 44–49 (1972).

App. 22. We regard the claim, in the light of Love's record, as frivolous.

The judgment of the District Court is reversed.

It is so ordered.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE STEVENS, with whom MR. JUSTICE MARSHALL joins, concurring.

While I join the opinion of the Court, I believe it is important to point out that the Court has not rejected the constitutional analysis of the District Court. The District Court held that a driver's license may not be revoked on the basis of an *ex parte* determination that certain facts "indicate . . . disrespect for the traffic laws." This Court does not disagree. It merely holds that the District Court erred in its assumption that appellee's license was revoked on the authority of the first sentence of Rule 6–206 (a)3 (1975),[1] which the District Court construed to require such a determination.[2]

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[1] Rule 6–206 (a)3 provides:

"A person repeatedly involved in collisions or convictions to a degree which indicates the lack of ability to exercise ordinary and reasonable care in the safe operation of a motor vehicle, or whose record indicates disrespect for traffic laws and the safety of other persons on the highway, and who has accumulated sufficient points to warrant a second suspension within a 5 year period, may either be suspended or revoked by the Secretary of State, based upon the number of points in his record. A person who has been suspended thrice within a 10 year period shall be revoked."

[2] The District Court construed Rule 6–206 (a)3 as follows:

"The statute makes suspension or revocation dependent on a determination of whether the driver's repeated involvement in collisions or conviction of offenses indicates lack of ability to use due care or disrespect for the traffic laws and the safety of others. The regulation makes suspension or revocation dependent *both* on such a determination *and* the accumulation of a given number of points, and even then the Secretary 'may' but

The Court interprets the Secretary's action as resting on the second sentence of Rule 6–206 (a)3 which provides that a person's license *must* be revoked if it has been suspended three times in 10 years. Appellee's license had already been suspended twice. A third suspension would have been required under a different rule because appellee had three convictions in one year.[3] Consequently, appellee's license was subject to mandatory revocation, see *ante*, at 111 n. 8, and no prior hearing was necessary.

MR. JUSTICE BRENNAN, concurring in the result.

My Brother STEVENS' concurring opinion makes clear that appellee's license was revoked under a valid regulation making

is not required to suspend or revoke the driver's license. Only when a driver has been suspended thrice in a ten-year period is the Secretary's action made mandatory." App. 20.

[3] Rule 6–206 (a)2 (1975) provides in pertinent part:

"A person who has been convicted of three (3) or more offenses against traffic regulations, governing the movement of vehicles, with the exception of those offenses excluded under provisions of Section 6–204 (2) and whose violations have occurred within a twelve (12) month period may be suspended as follows:

"Number of Points	Action
20 to 44	Suspension up to 2 months
45 to 74	Suspension up to 3 months
75 to 89	Suspension up to 6 months
90 to 99	Suspension up to 9 months
100 to 109	Suspension up to 12 months
Over 110	Revocation for not less than 12 months."

This rule can be fairly construed to leave the Secretary substantial discretion concerning only the *length* of the suspension. Moreover, this rule implements Ill. Rev. Stat. c. 95½, § 6–206 (a) (2) (1975), but the complaint does not challenge the constitutionality of that subsection; only § 206 (a) (3) is attacked.

The District Court noted that appellee had previously been "notified by letter that a further conviction would result in loss of his driving privileges." App. 17.

revocation mandatory if his license had been suspended three times within 10 years. Rule 6–206 (a)3 (1975). Appellee's license was properly suspended for a third time within a 10-year period when he was convicted of a speeding violation on March 31, 1976. This suspension, and both earlier suspensions, were based on convictions for traffic offenses which appellee does not contest here. Under these circumstances, the requirement of a prior hearing mandated by *Bell* v. *Burson*, 402 U. S. 535 (1971), is not applicable since, as my Brother STEVENS demonstrates, a hearing was unnecessary to establish what was already clear—that the revocation of appellee's license was mandatory.

Syllabus

KREMENS, HOSPITAL DIRECTOR, ET AL. *v.* BARTLEY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 75-1064. Argued December 1, 1976—Decided May 16, 1977

Appellees, five mentally ill individuals who were between 15 and 18 years old at the time the complaint was filed, were the named plaintiffs in an action challenging the constitutionality of a 1966 Pennsylvania statute governing the voluntary admission and voluntary commitment to state mental health institutions of persons aged 18 or younger. Appellees sought to vindicate their constitutional rights and to represent a class consisting of all persons under 18 "who have been, are, or, may be admitted or committed" to state mental health facilities. The statute provided, *inter alia*, that a juvenile might be admitted upon a parent's application, and that, unlike an adult, the admitted person was free to withdraw only with the consent of the parent admitting him. After the commencement of the action, regulations were promulgated substantially increasing the procedural safeguards afforded minors aged 13 or older. After those regulations had become effective, and notwithstanding the differentiation therein between juveniles of less than 13 and those 13 to 18, the District Court certified the class to be represented by the plaintiffs as consisting of all persons 18 or younger who have been or may be admitted or committed to Pennsylvania mental health facilities pursuant to the challenged provisions. The District Court later issued a decision holding those provisions violative of due process. In July 1976, after that decision, and after this Court had noted probable jurisdiction, a new statute was enacted, repealing the provisions held to be unconstitutional except insofar as they relate to the mentally retarded. Under the 1976 Act a person 14 or over may voluntarily admit himself, but his parents may not do so; thus those 14 to 18 who were subject to commitment by their parents under the 1966 Act are treated as adults by the 1976 Act. Children 13 and younger may still be admitted for treatment by a parent. Those 14 and over may withdraw from voluntary treatment by giving written notice. Those under 14 may be released on the parent's request, and "any responsible party" may petition for release. *Held:*

1. The enactment of the 1976 Act, which completely repealed and replaced the challenged provisions vis-à-vis the named appellees, clearly

moots the claims of the named appellees, who are treated as adults totally free to leave the hospital and who cannot be forced to return unless they consent to do so. Pp. 128–129.

2. The material changes in the status of those included in the class certified by the District Court that resulted from the 1976 Act and the regulations preclude an informed resolution of that class' constitutional claims. Pp. 129–133.

(a) Though the mootness of the claims of named plaintiffs does not "inexorably" require dismissal of the claims of the unnamed members of the class, *Sosna* v. *Iowa*, 419 U. S. 393; *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, this Court has never adopted a flat rule that the mere fact of certification by a district court requires resolution of the merits of the claims of the unnamed members of the class when those of the named parties had become moot. Pp. 129–130.

(b) Here the status of all members of the class, except those individuals who are younger than 13 and mentally retarded, has changed materially since this suit began; the intervening legislation has fragmented the class. The propriety of the class certification is thus a matter of gravest doubt. Cf. *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128. Pp. 130–133.

(c) Moreover, the issue in this case with respect to a properly certified class is not one that is "capable of repetition, yet evading review." *Sosna*, *supra*, distinguished. P. 133.

3. Since none of the critical factors that might allow adjudication of the claims of a class after mootness of the named plaintiffs' claims are present here, the case must be remanded to the District Court for reconsideration of the class definition, exclusion of those whose claims are moot, and substitution of class representatives with live claims. Pp. 133–135.

402 F. Supp. 1039, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 137.

Norman J. Watkins, Deputy Attorney General of Pennsylvania, argued the cause for appellants. With him on the briefs were *Robert P. Kane*, Attorney General, *Barry A. Roth*, Assistant Attorney General, and *J. Justin Blewitt, Jr.*, Deputy Attorney General.

David Ferleger argued the cause and filed a brief for appellees.

Bernard G. Segal argued the cause for the Supreme Court of Pennsylvania as *amicus curiae*. With him on the brief was *James D. Crawford*.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

I

Appellees Bartley, Gentile, Levine, Mathews, and Weand were the named plaintiffs in a complaint challenging the constitutionality of Pennsylvania statutes governing the voluntary admission and voluntary commitment to Pennsylvania mental health institutions of persons 18 years of age or younger. The named plaintiffs alleged that they were then being held at Haverford State Hospital, a Pennsylvania mental health facility, and that they had been admitted or committed pursuant to the challenged provisions of the

*Briefs of *amici curiae* urging reversal were filed by *Curt T. Schneider*, Attorney General, and *Bruce A. Roby* for the State of Kansas; and by *Bruce A. Miller* for the Michigan Association of Emotionally Disturbed Children.

Briefs of *amici curiae* urging affirmance were filed by *Lawrence E. Walsh*, *John H. Lashly*, and *Michael S. Lottman* for the American Bar Assn.; by *Stanley C. Van Ness* for the Department of the Public Advocate, Division of Mental Health Advocacy of New Jersey; by *Gary J. Kolb* for Michigan Legal Services et al.; and by *Robert L. Walker* and *Peter B. Sandmann* for the Youth Law Center.

Briefs of *amici curiae* were filed by *Solicitor General Bork*, *Assistant Attorney General Pottinger*, *Brian K. Landsberg*, and *Judith E. Wolf* for the United States; by *Patricia M. Wald* and *Paul R. Friedman* for the American Orthopsychiatric Assn. et al.; by *Allen R. Snyder* for the American Psychiatric Assn. et al.; by *Bayard M. Graf*, *Harold E. Kohn*, *Samuel E. Klein*, and *Frank E. Hahn, Jr.*, for the Devereux Foundation et al.; by *Michael A. Wolff* for the National Juvenile Law Center; and by *Stephen P. Berzon*, *Marian Wright Edelman*, *Stephen Wizner*, and *Joseph J. Levin, Jr.*, for the plaintiffs in *Poe et al.* v. *Mathews et al.* and other cases.

Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann., tit. 50, § 4101 *et seq.* (1969). Various state and hospital officials were named as defendants.[1]

Plaintiffs sought to vindicate not only their own constitutional rights, but also sought to represent a class consisting of

> "all persons under eighteen years of age who have been, are, or, may be admitted or committed to Haverford State Hospital and all other state mental health facilities under the challenged provisions of the state statute." App. 10a–11a (complaint ¶ 7).

A three-judge United States District Court for the Eastern District of Pennsylvania struck down the statutes as violative of the Due Process Clause of the Fourteenth Amendment. 402 F. Supp. 1039 (1975). The court also entered a broad order requiring the implementation of detailed procedural protections for those admitted under the Pennsylvania statutes. On December 15, 1975, this Court granted appellants' application for a stay of the judgment of the District Court. On March 22, 1976, we noted probable jurisdiction. 424 U. S. 964.

In general, the 1966 Act, which has been superseded to a significant degree, provides for three types of admission to a mental health facility for examination, treatment, and care: voluntary admission or commitment (§§ 402 and 403), emergency commitment (§ 405), and civil court commitment (§ 406). At issue here was the constitutionality of the voluntary admission and commitment statutes,[2] §§ 402 and 403,

[1] Haverford State Hospital was initially named as a defendant but was dismissed by mutual agreement. 402 F. Supp. 1039, 1043 n. 6 (ED Pa. 1975).

[2] The principal distinction between the sections is that a voluntary commitment is not to exceed 30 days, with successive periods not to exceed 30 days each, as long as care or observation is necessary. There is no time limitation following a voluntary admission to a facility. See *id.*, at 1054–1055, n. 3 (dissenting opinion). See also n. 4, *infra*. There has been no distinction between the two sections for purposes of this lawsuit. Hence, unless otherwise indicated, we shall use the words "admitted" and "committed" interchangeably.

as those statutes regulate the admission of persons 18 years of age or younger. The statutes[3] provide that juveniles may be admitted upon the application of a parent, guardian,

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[3] The statutes provide:

§ 402. "Voluntary admission; application, examination and acceptance; duration of admission

"(a) Application for voluntary admission to a facility for examination, treatment and care may be made by:

"(1) Any person over eighteen years of age.

"(2) A parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years of age or younger.

"(b) When an application is made, the director of the facility shall cause an examination to be made. If it is determined that the person named in the application is in need of care or observation, he may be admitted.

"(c) Except where application for admission has been made under the provisions of section 402 (a) (2) and the person admitted is still eighteen years of age or younger, any person voluntarily admitted shall be free to withdraw at any time. Where application has been made under the provisions of section 402 (a) (2), only the applicant or his successor shall be free to withdraw the admitted person so long as the admitted person is eighteen years of age or younger.

"(d) Each admission under the provisions of this section shall be reviewed at least annually by a committee, appointed by the director from the professional staff of the facility wherein the person is admitted, to determine whether continued care is necessary. Said committee shall make written recommendations to the director which shall be filed at the facility and be open to inspection and review by the department and such other persons as the secretary by regulation may permit.

"Where the admission is under the provisions of section 402 (a) (2), the person admitted shall be informed at least each sixty days of the voluntary nature of his status at the facility." Pa. Stat. Ann., tit. 50, § 4402 (1969) (footnote omitted).

§ 403. "Voluntary commitment; application, examination and acceptance; duration of commitment

"(a) Application for voluntary commitment to a facility for examination, treatment and care may be made by:

"(1) Any person over eighteen years of age.

"(2) A parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years of age or younger.

"(b) The application shall be in writing, signed by the applicant in the

or individual standing *in loco parentis* and that, unlike adults, the admitted person is free to withdraw only with the consent of the parent or guardian admitting him.[4]

There have been two major changes in the Pennsylvania statutory scheme that have materially affected the rights of juveniles: the promulgation of regulations under the 1966 Act, and the enactment of the Mental Health Procedures Act in 1976. At the time the complaint was filed, the 1966 Act

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presence of at least one witness. When an application is made, the director of the facility shall cause an examination to be made. If it is determined that the person named in the application is in need of care or observation, he shall be committed for a period not to exceed thirty days. Successive applications for continued voluntary commitment may be made for successive periods not to exceed thirty days each, so long as care or observation is necessary.

"(c) No person voluntarily committed shall be detained for more than ten days after he has given written notice to the director of his intention or desire to leave the facility, or after the applicant or his successor has given written notice of intention or desire to remove the detained person.

"(d) Each commitment under the provisions of this section shall be reviewed at least annually by a committee, appointed by the director from the professional staff of the facility wherein the person is cared for, to determine whether continued care and commitment is necessary. Said committee shall make written recommendations to the director which shall be filed at the facility and be open to inspection and review by the department and such other persons as the secretary by regulation shall permit.

"Where the commitment is under the provisions of section 403 (a)(2), the person committed shall be informed at least each sixty days of the voluntary nature of his status at the facility." Pa. Stat. Ann., tit. 50, § 4403 (1969) (footnote omitted).

[4] With respect to those voluntarily admitted, the 1966 Act explicitly distinguishes between adults, who are free to withdraw at any time, and those 18 and younger, who may withdraw only with the consent of the admitting parent or guardian. § 402 (c). However, § 403 (c), relating to withdrawal after voluntary commitment, does not explicitly make an age distinction, and, on its face, would allow either the person committed or the applicant (*i. e.*, the parent or guardian) to effect the withdrawal. However, neither the court below nor the parties have read the statute as containing this distinction. *E. g.*, Brief for Appellants 25.

made little or no distinction between older and younger juveniles. Each of the named plaintiffs was at that time between 15 and 18 years of age. After the commencement of this action, but *before* class certification or decision on the merits by the District Court, the Pennsylvania Department of Public Welfare promulgated regulations which substantially increased the procedural safeguards afforded to minors 13 years of age or older. The regulations, promulgated pursuant to statutory authority,[5] became effective September 1, 1973. The major impact of the regulations[6] upon this litigation stems from the fact that the regulations accord significant procedural protections to those 13 and older, but not to those less than 13. The older juveniles are given notification of their rights, the telephone number of counsel, and the right to institute a § 406 involuntary commitment proceeding in court within two business days. Under § 406,[7] a judicial hearing is held after notice to the parties. The younger juveniles are not given the right to a hearing and are still remitted to relying upon the admitting parent or guardian.

Although the regulations sharply differentiate between juveniles of less than 13 years of age and those 13 to 18, on April 29, 1974, the District Court nonetheless certified the following class to be represented by the plaintiffs:

> "This action shall be maintained as a class action under Rule 23 (b)(1) and (2) of the Federal Rules of Civil Procedure on behalf of the class comprised of all persons eighteen years of age or younger who have been, are or may be admitted or committed to mental health facilities in Pennsylvania pursuant to the challenged

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[5] § 201 (2) of the 1966 Act.

[6] Relevant portions of the regulations are set forth in the District Court's opinion. 402 F. Supp., at 1042–1043, n. 5.

[7] Section 406 is the statute that provides for the hearing procedures to be used in an *involuntary* civil court commitment. Pa. Stat. Ann., tit. 50, § 4406 (1969).

provisions of the state mental health law (i. e., 50 P. S. §§ 4402 and 4403). This definition of the class is without prejudice to the possibility that it may be amended or altered before the decision on the merits herein." App. 270a.

On July 9, 1976, after the decision below and after this Court had noted probable jurisdiction, Pennsylvania enacted a new statute substantially altering its voluntary admission procedures. Mental Health Procedures Act, Pa. Act No. 143. The new Act completely repeals the provisions declared unconstitutional below except insofar as they relate to mentally retarded persons. § 502. Under the new Act, any person 14 years of age or over may voluntarily admit himself, but his parents may not do so; those 14 to 18 who were subject to commitment by their parents under the 1966 Act are treated essentially as adults under the new Act. § 201.[8] Under the new Act children 13 and younger may still be admitted for treatment by a parent, guardian, or person standing *in loco parentis*. *Ibid.* Those 14 and over may withdraw from voluntary treatment "at any time by giving written notice." § 206 (a).[9] Those under 14 may be released by request of the parent; in addition, "any responsible party" may petition the Juvenile Division of the Court of Common

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[8] Section 201 provides:

"Any person 14 years of age or over who believes that he is in need of treatment and substantially understands the nature of voluntary commitment may submit himself to examination and treatment under this act, provided that the decision to do so is made voluntarily. A parent, guardian, or person standing in loco parentis to a child less than 14 years of age may subject such child to examination and treatment under this act, and in so doing shall be deemed to be acting for the child. Except as otherwise authorized in this act, all of the provisions of this act governing examination and treatment shall apply."

[9] Section 206 provides:

"(a) A person in voluntary inpatient treatment may withdraw at any time by giving written notice unless, as stated in section 203, he has

Pleas to request withdrawal of the child or modification of his treatment. § 206 (b).

Because we have concluded that the claims of the named appellees are mooted by the new Act, and that the claims of the unnamed members of the class are not properly presented for review, we do not dwell at any length upon the statutory scheme for voluntary commitment in Pennsylvania or upon the rationale of the District Court's holding that the 1966 Act and regulations did not satisfy due process.

II

This case presents important constitutional issues—issues that were briefed and argued before this Court. However, for reasons hereafter discussed, we conclude that the claims of the named appellees are mooted by the new Act and

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agreed in writing at the time of his admission that his release can be delayed following such notice for a period to be specified in the agreement, provided that such period shall not exceed 72 hours.

"(b) If the person is under the age of 14, his parent, legal guardian, or person standing in loco parentis may effect his release. If any responsible party believes that it would be in the best interest of a person under 14 years of age in voluntary treatment to be withdrawn therefrom or afforded treatment constituting a less restrictive alternative, such party may file a petition in the Juvenile Division of the court of common pleas for the county in which the person under 14 years of age resides, requesting a withdrawal from or modification of treatment. The court shall promptly appoint an attorney for such minor person and schedule a hearing to determine what inpatient treatment, if any, is in the minor's best interest. The hearing shall be held within ten days of receipt of the petition, unless continued upon the request of the attorney for such minor. The hearing shall be conducted in accordance with the rules governing other Juvenile Court proceedings.

"(c) Nothing in this act shall be construed to require a facility to continue inpatient treatment where the director of the facility determines such treatment is not medically indicated. Any dispute between a facility and a county administrator as to the medical necessity for voluntary inpatient treatment of a person shall be decided by the Commissioner of Mental Health or his designate." (Footnote omitted.)

decline to adjudicate the claims of the class certified by the District Court. That class has been fragmented by the enactment of the new Act and the promulgation of the regulations.

Constitutional adjudication being a matter of "great gravity and delicacy," see *Ashwander* v. *TVA*, 297 U. S. 288, 345 (1936) (Brandeis, J., concurring), we base our refusal to pass on the merits on "the policy rules often invoked by the Court 'to avoid passing prematurely on constitutional questions. Because [such] rules operate in "cases confessedly within [the Court's] jurisdiction" . . . they find their source in policy, rather than purely constitutional, considerations.'" *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 756 n. 8 (1976).

A

At the time the complaint was filed, each of the named plaintiffs was older than 14, and insofar as the record indicates, mentally ill.[10] The essence of their position was that, as matters stood at that time, a juvenile 18 or younger could be "voluntarily" admitted upon application of his parent, over the objection of the juvenile himself. Thus, appellees urged in their complaint that the Due Process Clause required that they be accorded the right to a hearing, as well as other procedural protections, to ensure the validity of the commitment. App. 21a–22a (complaint ¶ 46).

The fact that the Act was passed after the decision below does not save the named appellees' claims from mootness. There must be a live case or controversy before this Court,

[10] The following notations are found in various medical records and evaluations in the record: (a) appellee Bartley, "Admission Note: Organic Brain Syndrome with epilepsy" (App. 137a); (b) appellee Gentile, "Schizophrenia" (*id.*, at 145a); appellee Levine, "functioning within the average range of intelligence" (*id.*, at 167a); appellee Weand, "dull normal range of intelligence" (*id.*, at 169a); appellee Mathews, "functioning on a lower average range of intelligence, giving evidence of bright, normal and even superior learning capacities" (*id.*, at 175a).

Sosna v. *Iowa*, 419 U. S. 393, 402 (1975), and we apply the law as it is now, not as it stood below. *Fusari* v. *Steinberg*, 419 U. S. 379 (1975); *Sosna* v. *Iowa*, *supra*. Thus the enactment of the new statute [11] clearly moots the claims of the named appellees, and all others 14 or older and mentally ill.

These concerns were eradicated with the passage of the new Act, which applied immediately to all persons receiving voluntary treatment. § 501. The Act, in essence, treats mentally ill juveniles 14 and older as adults. They may voluntarily commit themselves, but their parents may not do so, § 201, and one receiving voluntary treatment may withdraw at any time by giving written notice. § 206. With respect to the named appellees, the Act completely repealed and replaced the statutes challenged below, and obviated their demand for a hearing, and other procedural protections, since the named appellees had total freedom to leave the hospital, and could not be forced to return absent their consent. After the passage of the Act, in no sense were the named appellees "detained and incarcerated involuntarily in mental hospitals," as they had alleged in the complaint, App. 21a.

B

If the only appellees before us were the named appellees, the mootness of the case with respect to them would require that we vacate the judgment of the District Court with instructions to dismiss their complaint. *United States* v. *Munsingwear*, 340 U. S. 36 (1950). But as we have previously indicated, the District Court certified, pursuant to Fed. Rule Civ. Proc. 23, the class described *supra*, at 125–126.

In particular types of class actions this Court has held that the presence of a properly certified class may provide an added dimension to our Art. III analysis, and that the moot-

[11] Given our view that the Act moots the claims of the named appellees, we need not address the issue of whether the promulgation of the new regulations had previously mooted their claims.

ness of the named plaintiffs' claims does not "inexorably" require dismissal of the action. *Sosna, supra,* at 399–401. See also *Franks* v. *Bowman Transportation, Inc., supra,* at 752–757; *Gerstein* v. *Pugh,* 420 U. S. 103, 110–111, n. 11 (1975). But we have never adopted a flat rule that the mere fact of certification of a class by a district court was sufficient to require us to decide the merits of the claims of unnamed class members when those of the named parties had become moot. Cf. *Sosna, supra,* at 402. Here, the promulgation of the regulations materially changed, prior to class certification, the controverted issues with respect to a large number of unnamed plaintiffs; prior to decision by this Court, the controverted issues pertaining to even more unnamed plaintiffs have been affected by the passage of the 1976 Act. We do not think that the fragmented residual of the class originally certified by the District Court may be treated as were the classes in *Sosna* and *Franks.*

There is an obvious lack of homogeneity among those unnamed members of the class originally certified by the District Court. Analysis of the current status of the various subgroups reveals a bewildering lineup of permutations and combinations. As we parse it, the claims of those 14 and older and mentally ill are moot. They have received by statute all that they claimed under the Constitution. Those 14 and older and mentally retarded are subject to the 1966 Act, struck down by the District Court, but are afforded the protections of the regulations. Their claims are not wholly mooted, but are satisfied in many respects by the regulations. Those 13 and mentally ill are subject to the admissions procedures of the new Act, arguably supplemented by the procedural protection of the regulations. The status of their claims is unclear. Those 13 and mentally retarded are subject to the 1966 Act and the regulations promulgated thereunder. Their claims are satisfied in many respects. Those younger than 13 and mentally ill are unaided by the

regulations and are subject to the admissions procedures of the 1976 Act, the constitutional effect of which has not been reviewed by the District Court. Those younger than 13 and mentally retarded are subject to the 1966 Act, unaffected by the regulations. This latter group is thus the *only* group whose status has not changed materially since the outset of the litigation. These fragmented subclasses are represented by named plaintiffs whose constitutional claims are moot, and it is the attorneys for these named plaintiffs who have conducted the litigation in the District Court and in this Court.[12]

The factors which we have just described make the class aspect of this litigation a far cry indeed from that aspect of the litigation in *Sosna* and in *Franks*, where we adjudicated the merits of the class claims notwithstanding the mootness of the claims of the named parties. In *Sosna*, the named plaintiff had by the time the litigation reached this Court fulfilled the residency requirement which she was challenging, but the class described in the District Court's certification remained exactly the same. In that case, mootness was due to the inexorable passage of time, rather than to any change in the law. In *Franks*, a Title VII discrimination lawsuit, the named plaintiff had been subsequently discharged for a nondiscriminatory reason, and therefore before this Court that plaintiff no longer had a controversy with his employer similar to those of the unnamed members of the class. But

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[12] MR. JUSTICE BRENNAN suggests that none of this is relevant to our adjudication of the case. *Post*, at 140–142. Implicit in this suggestion is the conclusion that in the present posture of this case certification of a class represented by these named plaintiffs would be acceptable. This approach disregards the prerequisites to class actions contained in Fed. Rule Civ. Proc. 23 (a), see n. 14, *infra*, and pushed to its logical conclusions would do away with the standing requirement of Art. III. See, *e. g.*, *Bailey* v. *Patterson*, 369 U. S. 31, 33 (1962) (parties may not "represent a class of whom they are not a part"); *Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 216 (1974) (class representative must "possess the same interest and suffer the same injury" as members of class).

the metes and bounds of each of those classes remained the same; the named plaintiff was simply no longer within them.

Here, by contrast, the metes and bounds of the class certified by the District Court have been carved up by two changes in the law. In *Sosna* and *Franks*, the named plaintiffs had simply "left" the class, but the class remained substantially unaltered. In both of those cases, the named plaintiff's mootness was not related to any factor also affecting the unnamed members of the class. In this case, however, the class has been both truncated and compartmentalized by legislative action; this intervening legislation has rendered moot not only the claims of the named plaintiffs but also the claims of a large number of unnamed plaintiffs.[13] The legislation, coupled with the regulations, has in a word materially changed the status of those included within the class description.

For all of the foregoing reasons, we have the gravest doubts whether the class, as presently constituted, comports with the requirements of Fed. Rule Civ. Proc. 23 (a).[14] And it is

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[13] Mr. Justice Brennan, *post*, at 142, seeks to minimize the extent of the changes in the law by asserting that only 20% of the plaintiff class is affected by the new Act. Even if this assertion were undisputed, it would not affect our disposition of the case. But we have no way to test the reliability of that figure. Before the new Act was passed, the distinction between mentally ill and mentally retarded was largely irrelevant for admissions purposes; hence the District Court made no findings with respect to the proportion of the class in each category, and the dissent does not indicate any support in the record for this figure, which first appears in the Reply Brief for Appellants 1 n. 2. Since this information was supplied by a party seeking a determination on the merits, it cannot be treated as a form of "admission against interest" by a litigant on appeal. In addition, the suggestion that 80% of the class remains *in statu quo ante* completely overlooks the substantial changes wrought by the regulations, which classified on the basis of age, rather than on the basis of mental illness or mental retardation.

[14] Rule 23 (a) provides:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable,

only a "properly certified" class that may succeed to the adversary position of a named representative whose claim becomes moot. *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975).

In addition to the differences to which we have already adverted, the issues presented by these appellees, unlike that presented by the appellant in *Sosna, supra*, are not "capable of repetition, yet evading review." In the latter case there is a significant benefit in according the class representative the opportunity to litigate on behalf of the class, since otherwise there may well never be a definitive resolution of the constitutional claim on the merits by this Court. We stated in *Franks* that "[g]iven a properly certified class action, . . . mootness turns on whether, in the specific circumstances of the given case at the time it is before this Court, an adversary relationship sufficient to fulfill this function exists." 424 U. S., at 755–756. We noted that the "evading review" element was one factor to be considered in evaluating the adequacy of the adversary relationship in this Court. *Id.*, at 756 n. 8. In this case, not only is the issue one that will not evade review, but the existence of a "properly certified class action" is dubious, and the initial shortcomings in the certification have multiplied. See *Indianapolis School Comm'rs* v. *Jacobs, supra.*

In sum, none of the critical factors that might require us to adjudicate the claims of a class after mootness of the named plaintiff's claims are present here. We are dealing with important constitutional issues on the merits, issues which are not apt to evade review, in the context of mooted claims on the part of all of the named parties and a certified class which, whatever the merits of its original

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(2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

certification by the District Court, has been fragmented by the enactment of legislation since that certification. While there are "live" disputes between unnamed members of portions of the class certified by the District Court, on the one hand, and appellants, on the other, these disputes are so unfocused as to make informed resolution of them almost impossible. Cf. *Fusari* v. *Steinberg*, 419 U. S. 379 (1976). We accordingly decline to pass on the merits of appellees' constitutional claims.[15]

We conclude that before the "live" claims of the fragmented subclasses remaining in this litigation can be decided on the merits, the case must be remanded to the District Court

[15] MR. JUSTICE BRENNAN suggests that our refusal to review the merits of these claims, and our vacation of the District Court's judgment, are simply a confusing and unnecessary exaltation of form over substance. While our refusal to pass on the merits rests on discretionary considerations, we have long heeded such discretionary counsel in constitutional litigation. See *Ashwander* v. *TVA*, 297 U. S. 288, 341 (1936) (Brandeis, J., concurring). The dissent's startling statement that our insistence on plaintiffs with live claims is "purely a matter of form," *post*, at 142, would read into the Constitution a vastly expanded version of Rule 23 while reading Art. III out of the Constitution. The availability of thoroughly prepared attorneys to argue both sides of a constitutional question, and of numerous *amici curiae* ready to assist in the decisional process, even though all of them "stand like greyhounds in the slips, straining upon the start," does not dispense with the requirement that there be a live dispute between "live" parties before we decide such a question.

The dissent, *post*, at 137, attaches great weight to the fact that the State argues that the case is not moot. As we have pointed out in the text, *infra*, at 136, the fact that the parties desire a decision on the merits does not automatically entitle them to receive such a decision. It is not at all unusual for all parties in a case to desire an adjudication on the merits when the alternative is additional litigation; but their desires can be scarcely thought to dictate the result of our inquiry into whether the merits should be reached. The dissent's additional reliance on the "numerous *amici* [who have requested] an authoritative constitutional ruling . . ." *post*, at 140, overlooks the fact that briefs for no fewer than eight of these *amici* argue that the case is moot or suggest that the case be remanded for consideration of the intervening legislation.

for reconsideration of the class definition, exclusion of those whose claims are moot, and substitution of class representatives with live claims.

Because the District Court will confront this task on remand, we think it not amiss to remind that court that it is under the same obligation as we are to "stop, look, and listen" before certifying a class in order to adjudicate constitutional claims. That court, in its original certification, ignored the effect of the regulations promulgated by appellants which made a dramatic distinction between older and younger juveniles,[16] and, according to the District Court, 402 F. Supp., at 1042, accorded the named appellees all of the protections which they sought, save two: the right to a precommitment hearing, and the specification of the time for the postcommitment hearing.

This distinction between older and younger juveniles, recognized by state administrative authorities (and later by the Pennsylvania Legislature in its enactment of the 1976 Act), emphasizes the very possible differences in the interests of the older juveniles and the younger juveniles. Separate counsel for the younger juveniles might well have concluded that it would not have been in the best interest of their clients to press for the requirement of an automatic precommitment hearing, because of the possibility that such a hearing with its propensity to pit parent against child might actually be antithetical to the best interest of the younger juveniles. In the event that these issues are again litigated before the District Court, careful attention must be paid to the differences between mentally ill and mentally re-

[16] Upon promulgation of the regulations, the named appellees received, *inter alia*, the right to institute a "section 406" involuntary commitment proceeding in court within two business days. Under § 406, a judicial hearing is held after notice to the parties; counsel is provided for indigents. It is this right to a hearing that was the gravamen of appellees' complaint. App. 21a–23a (complaint ¶ 46).

tarded, and between the young and the very young. It may be that Pennsylvania's experience in implementing the new Act will shed light on these issues.

III

This disposition is made with full recognition of the importance of the issues, and of our assumption that all parties earnestly seek a decision on the merits. As Mr. Justice Brandeis stated in his famous concurrence in *Ashwander* v. *TVA*, 297 U. S., at 345:

> "The fact that it would be convenient for the parties and the public to have promptly decided whether the legislation assailed is valid, cannot justify a departure from these settled rules . . . ."

And, as we have more recently observed in the context of "ripeness":

> "All of the parties now urge that the 'conveyance taking' issues are ripe for adjudication. However, because issues of ripeness involve, at least in part, the existence of a live 'Case or Controversy,' we cannot rely upon concessions of the parties and must determine whether the issues are ripe for decision in the 'Case or Controversy' sense. Further, to the extent that questions of ripeness involve the exercise of judicial restraint from unnecessary decision of constitutional issues, the Court must determine whether to exercise that restraint and cannot be bound by the wishes of the parties." *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 138 (1974). (Footnote omitted.)

Our analysis of the questions of mootness and of our ability to adjudicate the claims of the class in this case is consistent with the long-established rule that this Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool,*

N. Y. & P. S. S. Co. v. *Emigration Comm'rs*, 113 U. S. 33, 39 (1885). The judgment of the District Court is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

As was true three Terms ago with respect to another sensitive case brought to this Court, I can "find no justification for the Court's straining to rid itself of this dispute." *DeFunis* v. *Odegaard*, 416 U. S. 312, 349 (1974) (BRENNAN, J., dissenting). "Although the Court should, of course, avoid unnecessary decisions of constitutional questions, we should not transform principles of avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases." *Id.*, at 350.

Pursuant to Fed. Rule Civ. Proc. 23, the District Court, on April 29, 1974, certified appellee class consisting of persons 18 years of age or younger who are or may be committed to state mental facilities under Pennsylvania's Mental Health and Mental Retardation Act of 1966. The State not only did not then oppose the certification, but to this day urges that this Court render a decision on the "important constitutional issues . . . that were briefed and argued before this Court." *Ante*, at 127. Over a score of *amici curiae* organizations and parties similarly joined in presenting their views to us. Ordinarily of course, the defendant's failure to object to a class certification waives any defects not related to the "cases or controversies" requirement of Art. III, cf. *O'Shea* v. *Littleton*, 414 U. S. 488, 494–495 (1974), and would require us to proceed to the merits of the dispute.

The Court pointedly does not suggest that the class definition suffers from constitutionally based jurisdictional deficiencies. Instead, its analysis follows a different route. We

are first told that it is likely [1] that the claims of the named class members are moot. After several pages in which the Court parses decisions like *Sosna* v. *Iowa*, 419 U. S. 393 (1975), and *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976), for selected clauses and phrases, thereby attempting to distinguish the present case from those earlier decisions where class claims were allowed to reach decision, the opinion ultimately concludes that in their present posture the legal claims of the class members "are so unfocused as to make informed resolution of them almost impossible," *ante*, at 134, citing *Fusari* v. *Steinberg*, 419 U. S. 379 (1975). Accordingly, the Court "decline[s] to pass on the merits of appellees' constitutional claims," *ante*, at 134, and remands to the District Court for clarification of the class certification.

What does all this mean? Most importantly, the Court's class-action analysis must be placed in proper perspective, for it is obvious that the Court's extended discussion of *Sosna*, *Franks*, and like cases is a mere camouflage of dicta bearing no relationship to the disposition of this case. Those earlier cases merely recognized the continued existence of Art. III jurisdiction notwithstanding the subsequent mootness of the claims of the named parties to a class action. They said nothing about this Court's discretionary authority to remand a class claim or any other claim to the lower courts for needed

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[1] The statutory modification upon which the Court principally relies for mootness pertains solely to mentally ill children 14 or older, whereas the class consists of all children who are mentally ill and retarded. Since this distinction was irrelevant when the action commenced, the complaint does not inform us whether the named class members, while older than 14, are mentally ill or mentally retarded. Thus, it is accurate for the Court to state that "insofar as the record indicates," all the named children are mentally ill and consequently fall within the purview of the 1976 statutory amendment. *Ante*, at 128. But, since the record barely scratches the surface in this regard, it is possible that some of the children have been committed because of retardation. If so, the Court's supposition that the claims of the named parties are mooted is inaccurate and presumably can be corrected by the District Court on remand.

clarification. Thus, in the present case, the fact that the claims of the named plaintiffs may or may not be mooted, *ante*, at 128–129, is irrelevant, for, if the condition of the record so requires, a remand to clarify matters necessary to permit proper consideration of the issues in this appeal would be warranted regardless of whether the named parties remained in the case. Similarly, the Court's various suggestions that these named plaintiffs "left" the class in a manner distinguishable from those in *Sosna* and *Franks*, *ante*, at 132, and that the issues presented herein are "not capable of repetition, yet evading review," *ante*, at 133, are without meaning. This Court's power to remand cases as in *Fusari* v. *Steinberg* is in no way dependent on these factors, and is not foreclosed by the existence of Art. III jurisdiction as found in *Franks*, *Sosna*, and their progeny.

Indeed, it is clear that for all the extraneous discussion of *Sosna* and *Franks*, the decision today follows those cases, for it recognizes that an Art. III "case or controversy" persists in this instance notwithstanding the apparent mootness of the claims of named plaintiffs, and, therefore, confirms that our jurisdiction is constitutionally viable. Otherwise, of course, the Court could not, as it does today, voluntarily "decline" to pass on the merits of the suit, *ante*, at 134, but rather would be *compelled* to avoid any such decision. While, as shall be seen, I disagree that the modification of Pennsylvania law warrants even a clarifying remand in this instance, I think it particularly unwise to hide a purely discretionary decision behind the language of Art. III jurisdiction. After all, the action actually taken today by the Court—a remand for consideration in light of intervening law—is regularly ordered in one or two short paragraphs without such fanfare or gratuitous discussion. See, *e. g.*, *Philadelphia* v. *New Jersey*, 430 U. S. 141 (1977); cf. *Cook* v. *Hudson*, 429 U. S. 165 (1976).

I do not express this objection to the Court's opinion due to a concern for craft alone. Jurisdictional and procedural mat-

ters regularly dealt with by the Court often involve complex and esoteric concepts. An opinion that is likely to lead to misapplication of these principles will cost litigants dearly and will needlessly consume the time of lower courts in attempting to decipher and construe our commands. Consequently, I have frequently voiced my concern that the recent Art. III jurisprudence of this Court in such areas as mootness and standing is creating an obstacle course of confusing standardless rules to be fathomed by courts and litigants, see, *e. g.*, *Warth* v. *Seldin*, 422 U. S. 490, 519–530 (1975) (BRENNAN, J., dissenting); *DeFunis* v. *Odegaard*, 416 U. S., at 348–350 (BRENNAN, J., dissenting), without functionally aiding in the clear, adverse presentation of the constitutional questions presented. As written, today's opinion can only further stir up the jurisdictional stew and frustrate the efforts of litigants who legitimately seek access to the courts for guidance on the content of fundamental constitutional rights.

In this very case, for example, we deny to the parties and to numerous *amici* intervenors an authoritative constitutional ruling for a reason that at best has only surface plausibility. In truth, the Court's purported concern for the "lack of homogeneity" among the children in the class is meaningless in the context of this appeal. The District Court's judgment established and applied a minimum threshold of due process rights available across the board to all children who are committed to mental facilities by their parents pursuant to Pennsylvania law. The core of the mandated rights, essentially the nonwaivable appointment of counsel for every child and the convening of commitment hearings within specified time periods,[2] applies equally to all Pennsylvania children who are subject to parental commitment. In reviewing the propriety of these

[2] In brief, the District Court mandated a probable-cause hearing within 72 hours of the initial detention followed by a complete postcommitment hearing within two weeks thereafter. 402 F. Supp. 1039, 1049 (ED Pa. 1975).

threshold constitutional requirements, our inquiry is not to any meaningful extent affected by the intervening change in Pennsylvania law.[3] Indeed, we are informed by Pennsylvania officials that the 1976 amendment, by abolishing parental commitment of mentally ill children over 14, merely serves to eliminate 20% of the members of the certified class from the lawsuit. Reply Brief for Appellants 1. The amendment, however, bears no relationship whatever to the District Court's judgment insofar as it pertains to the remaining 80% of the class—that is, to those children who can still be committed by their parents.[4] The Commonwealth of Pennsylvania itself

[3] The September 1, 1973, regulations, on which the Court additionally places some reliance, are even less relevant to the proper disposition of this case. Under these regulations, the procedural rights of juveniles 13 or older underwent change following commencement of this suit. These older juveniles now must be informed of their rights within 24 hours of commitment and must be given the telephone number of an attorney. Should the retarded or mentally ill child be capable and willing to take the initiative, he may object to this commitment, contact his lawyer, and request a hearing. The hospital then can file an involuntary commitment petition, whereby the child remains in the institution pending the hearing on his commitment; the regulations fix no time period in which this hearing must be held. In its consideration of this case, the District Court was fully aware of these regulations, but concluded that they do not resolve the constitutional infirmities that it found to inhere in Pennsylvania's statutory scheme. *Id.*, at 1042–1043, n. 5. In particular, the regulations fall far short of satisfying the lower court's judgment in its failure to guarantee to every child the nonwaivable guidance of an attorney and a prompt commitment hearing within a specified time period. For this reason, the Court's concern that the class is subdivided into "a bewildering lineup of permutations and combinations," *ante*, at 130, actually is of no constitutional significance to the decision of this suit. For even taking the regulations into account, all the children who can be committed by their parents continue to be held pursuant to procedures as to which plaintiffs complain, and as to which the District Court concluded, constitutional standards are not satisfied.

[4] The 1976 Act does provide that, with respect to all children, a "responsible party" may step forward and challenge a child's commitment by filing a petition in the juvenile court requesting the appointment

acknowledges that "[o]ver three-fourths of the plaintiff class . . . are subject to the very statutes which the lower court examined, declared unconstitutional, and enjoined." *Id.*, at 3. The Court's disposition of this case, therefore, ensures nothing but an opportunity for the waste of valuable time and energy. At most, the District Court on remand realistically can be expected to confirm that 20% of the children no longer are members of the class, while reaffirming its carefully considered judgment as to the remaining 80%. I do not understand why we do not spare the District Court this purely mechanical task of paring down the class, for nothing would now prevent us from excluding 20% of the children from our consideration of the merits and evaluating the District Court's judgment as it affects the remaining 80%. See, *e. g.*, *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 755–757.

Nor can the Court's action be justified by its order to the District Court that new class representatives with live claims be substituted to press forward with the suit. For, again, in the posture of this case, this is purely a matter of form. *Franks*, *Sosna*, and *Gerstein* v. *Pugh*, 420 U. S. 103, 110–111, n. 11 (1975), plainly recognize and act upon the premise that, given the representative nature of class actions,[5] the elimination of named plaintiffs ordinarily will have no effect on the "concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions."

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of an attorney and the convening of a hearing. Mental Health Procedures Act § 206 (b) (1976). Given that the most likely "responsible party," the child's parents, are the persons seeking his institutionalization, Pennsylvania itself recognizes that this amounts to "no real change in the law" and to no "additional procedural protections." Reply Brief for Appellants 1–2, n. 3.

[5] See, *e. g.*, *Craig* v. *Boren*, 429 U. S. 190, 194 (1976); *Singleton* v. *Wulff*, 428 U. S. 106, 117–118 (1976) (opinion of BLACKMUN, J.).

Baker v. *Carr*, 369 U. S. 186, 204 (1962). Certainly, in this appeal there can be no question of adequate adversity and cogency of argument. Attorneys for the class continue diligently to defend their judgment in behalf of the children who are still within the purview of Pennsylvania's parental commitment law. Pennsylvania equally diligently resists the District Court's judgment and pressures for a controlling constitutional decision. And a vast assortment of *amici curiae* ranging from sister States to virtually all relevant professional organizations have submitted briefs informing our deliberations from every perspective and orientation plausibly relevant to the case. In brief, the Court's assertion of its inability "to make informed resolution of" the issues is, in this instance, pure fancy.

I do not believe that we discharge our institutional duty fairly, or properly service the constituencies who depend on our guidance, by issuing meaningless remands that play wasteful games with litigants and lower courts.[6] Therefore, I re-

[6] On several occasions, the Court complains that my position, in characterizing today's action as meaningless and wasteful, fails to give due consideration to the requirements of Art. III and Rule 23. *Ante*, at 131 n. 12, 134 n. 15. This contention is seriously misleading. When the class was duly certified in 1974, both Rule 23 and Art. III were properly complied with—as I agree they must be. The Rule 23 issue is no longer before us, for we cannot, some three years later, *sua sponte* and over the objection of all parties, challenge compliance with a Rule of Civil Procedure, unless, of course, noncompliance or some intervening circumstance serves to undercut our jurisdiction. That is not the case here, however, for both the majority and I are in agreement that no jurisdictional defect is to be found. In sum, therefore, the inquiry applicable to this case is the following: Does this Court properly exercise its discretion through its remand to the District Court when (1) our Art. III jurisdiction is sound, *and* (2) the class plaintiff was properly certified pursuant to Federal Rule, *and* (3) no party objected or today objects to the certification, *and* (4) the class continues to possess live claims and a District Court judgment that are unaffected by any constitutionally relevant changes in state law, *and* (5) the substance of the constitutional con-

spectfully dissent from the Court's disposition of this case. Because the Court does not address the important constitutional questions presented, I too shall defer the expression of my views, pending the Court's inevitable review of those questions in a later case.

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tentions continue to be litigated cogently by both parties? When these factors are fairly taken into account, the conclusion is plain that today's action can be justified neither by the quasi-jurisdictional language which the Court needlessly includes in its opinion, nor by sound, practical considerations of discretion.

Syllabus

HENDERSON, CORRECTIONAL SUPERINTENDENT *v.* KIBBE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 75–1906. Argued March 1, 1977—Decided May 16, 1977

Respondent and his codefendant, after robbing an intoxicated man in their car, abandoned him at night on an unlighted, rural road where the visibility was obscured by blowing snow. Twenty or thirty minutes later, while helplessly seated in the road, the man was struck and killed by a speeding truck. Respondent and his accomplice were subsequently convicted in a New York trial court of grand larceny, robbery, and second-degree murder. A New York statute provides that a person is guilty of second-degree murder when "[u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person." Although the element of causation was stressed in the arguments of both defense counsel and the prosecution at the trial, neither party requested an instruction on the meaning of the "thereby causes" language of the statute and none was given. The trial judge, however, did read to the jury the statute and the indictment tracking the statutory language, and advised the jury that all elements of the crime charged must be proved beyond a reasonable doubt and that a "person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense *when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur.*" Respondent's conviction was upheld on appeal, the New York Court of Appeals rejecting the argument that the truckdriver's conduct constituted an intervening cause that relieved the defendants of criminal responsibility for the victim's death. Respondent then filed a habeas corpus petition in Federal District Court, which refused to review, as not raising a question of constitutional dimension, respondent's attack on the sufficiency of the jury charge. The Court of Appeals reversed, holding, on the authority of *In re Winship*, 397 U. S. 358, that since the Constitution requires proof beyond a reasonable doubt of every fact necessary to constitute the crime charged, the failure to instruct the jury on an essential element as complex as the causation issue in this case created an impermissible risk that the jury had not made a finding that the Constitution requires.

Held: The trial judge's failure to instruct the jury on the issue of causation was not constitutional error requiring the District Court to grant habeas corpus relief. Pp. 153–157.

(a) The omission of the causation instruction did not create a danger that the jury failed to make an essential factual determination as required by *Winship, supra,* where there can be no question from the record that the jurors were informed that the issue of causation was an element which required decision, and where they were instructed that all elements of the crime must be proved beyond a reasonable doubt. Pp. 153–154.

(b) The opinion of the New York Court of Appeals makes it clear that an adequate instruction would have told the jury that if the ultimate harm should have been foreseen as being reasonably related to the defendants' conduct, that conduct should be regarded as having caused the victim's death. There is no reason to believe that the jury would have reached a different verdict if such an instruction had been given. By returning a guilty verdict the jury necessarily found, in accordance with the trial court's instruction on recklessness, that respondent was "aware of and consciously disregarded a substantial and unjustifiable risk" that death would occur. This finding logically included a determination that the ultimate harm was foreseeable. Pp. 154–157.

534 F. 2d 493, reversed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 157. REHNQUIST, J., took no part in the consideration or decision of the case.

Lillian Zeisel Cohen, Assistant Attorney General of New York, argued the cause for petitioner. With her on the briefs were *Louis J. Lefkowitz,* Attorney General, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Margery Evans Reifler,* Assistant Attorney General.

Sheila Ginsberg argued the cause for respondent. With her on the brief were *William E. Hellerstein* and *Phylis Skloot Bamberger.**

**Lawrence T. Kurlander* filed a brief for Monroe County, N. Y., as *amicus curiae.*

MR. JUSTICE STEVENS delivered the opinion of the Court.

Respondent is in petitioner's custody pursuant to a conviction for second-degree murder. The question presented to us is whether the New York State trial judge's failure to instruct the jury on the issue of causation was constitutional error requiring a Federal District Court to grant habeas corpus relief. Disagreeing with a divided panel of the Court of Appeals for the Second Circuit, we hold that it was not.

On the evening of December 30, 1970, respondent and his codefendant encountered a thoroughly intoxicated man named Stafford in a bar in Rochester, N. Y.[1] After observing Stafford display at least two $100 bills,[2] they decided to rob him and agreed to drive him to a nearby town. While in the car, respondent slapped Stafford several times, took his money, and, in a search for concealed funds, forced Stafford to lower his trousers and remove his boots. They then abandoned him on an unlighted, rural road, still in a state of partial undress, and without his coat or his glasses. The temperature was near zero, visibility was obscured by blowing snow, and snow banks flanked the roadway. The time was between 9:30 and 9:40 p. m.

At about 10 p. m., while helplessly seated in a traffic lane about a quarter mile from the nearest lighted building, Stafford was struck by a speeding pickup truck. The driver testified that while he was traveling 50 miles per hour in a 40-mile zone, the first of two approaching cars flashed its lights—presumably as a warning which he did not understand. Immediately after the cars passed, the driver saw Stafford sitting in the road with his hands in the air. The driver neither swerved nor braked his vehicle before it hit Stafford. Stafford was pronounced dead upon arrival at the local hospital.

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[1] A pathologist testified that the alcohol content in Stafford's blood was indicative of a "very heavy degree of intoxication." App. 58.

[2] Tr. 723.

Respondent and his accomplice were convicted of grand larceny, robbery, and second-degree murder.[3] Only the conviction of murder, as defined in N. Y. Penal Law § 125.25 (2) (McKinney 1975), is now challenged. That statute provides that "[a] person is guilty of murder in the second degree" when "[u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, *and thereby causes the death of another person.*" (Emphasis added.)

Defense counsel argued that it was the negligence of the truckdriver, rather than the defendants' action, that had caused Stafford's death, and that the defendants could not have anticipated the fatal accident.[4] On the other hand, the prosecution argued that the death was foreseeable and would not have occurred but for the conduct of the defendants who

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[3] Respondent was sentenced to concurrent terms of 15 years to life on the murder conviction; 5–15 years on the robbery conviction; and an indeterminate term of up to four years on the grand larceny conviction.

[4] "Let's look at this indictment. Count 1 says and I will read the important part. That the defendant, 'Felon[i]ously and under circumstances evincing a depraved indifference to human life recklessly engaged in conduct which created a grave risk of death to another person, to wit, George Stafford and thereby caused the death of George Stafford.' So, you can see by the accent that I put on reaching that, the elements of this particular crime, and which must be proven beyond a reasonable doubt.

. . . . . .

". . . [Y]ou are going to have to honestly come to the conclusion that here is three people, all three drinking, and that these two, or at least my client were in a position to perceive this grave risk, be aware of it and disregard it. Perceive that Mr. Stafford would sit in the middle of the northbound lane, that a motorist would come by who was distracted by flashing lights in the opposite lane, who then froze at the wheel, who then didn't swerve, didn't brake, and who was violating the law by speeding, and to make matters worse, he had at that particular time, because of what the situation was, he had low beams on, that is a lot of anticipation. That is a lot of looking forward. Are you supposed to anticipate that somebody is going to break the law when you move or do something? I think that is a reasonable doubt." App. 68.

therefore were the cause of death.[5] Neither party requested the trial judge to instruct the jury on the meaning of the statutory requirement that the defendants' conduct "thereby cause[d] the death of another person," and no such instruction was given. The trial judge did, however, read the indictment and the statute to the jury and explained the meaning of some of the statutory language. He advised the jury that a "person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense *when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur* or that such circumstance exists." App. 89 (emphasis added).

The Appellate Division of the New York Supreme Court affirmed respondent's conviction. *People* v. *Kibbe*, 41 App. Div. 2d 228, 342 N. Y. S. 2d 386 (1973). Although respondent did not challenge the sufficiency of the instructions to the jury in that court, Judge Cardamone dissented on the ground that the trial court's charge did not explain the issue of causation

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[5] "As I mentioned not only does the first count contain reference to and require proof of a depraved indifference to a human life, it proves that the defendant recklessly engaged in conduct which created a risk of death in that they caused the death of George Stafford. Now, I very well know, members of the jury, you know, that quite obviously the acts of both of these defendants were not the only the direct or the most preceding cause of his death. If I walked with one of you downtown, you know, and we went across one of the bridges and you couldn't swim and I pushed you over and you drowned because you can't swim, I suppose you can say, well, you drowned because you couldn't swim. But of course, the fact is that I pushed you over. The same thing here. Sure, the death, the most immediate, the most preceding, the most direct cause of Mr. Stafford's death was the motor vehicle . . . . But how did he get there? Or to put it differently, would this man be dead had it not been for the acts of these two defendants? And I submit to you, members of the jury, that the acts of these two defendants did indeed cause the death of Mr. Stafford. He didn't walk out there on East River Road. He was driven out there. His glasses were taken and his identification was taken and his pants were around his ankles." *Id.*, at 75–76.

or include an adequate discussion of the necessary mental state. That judge expressed the opinion that "the jury, upon proper instruction, could have concluded that the victim's death by an automobile was a remote and intervening cause." [6]

The New York Court of Appeals also affirmed. 35 N. Y. 2d 407, 321 N. E. 2d 773 (1974). It identified the causation issue as the only serious question raised by the appeal, and then rejected the contention that the conduct of the driver of the pickup truck constituted an intervening cause which relieved the defendants of criminal responsibility for Stafford's death. The court held that it was "not necessary that the ultimate harm be intended by the actor. It will suffice if it can be said beyond a reasonable doubt, as indeed it can be here said, that the ultimate harm is something which should have been foreseen as being reasonably related to the acts of the accused." [7] The court refused to consider the adequacy of the charge to the jury because that question had not been raised in the trial court.

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[6] 41 App. Div. 2d, at 231, 342 N. Y. S. 2d, at 390. He added:

"There are no statutory provisions dealing with intervening causes—nor is civil case law relevant in this context. The issue of causation should have been submitted to the jury in order for it to decide whether it would be unjust to hold these appellants liable as murderers for the chain of events which actually occurred. Such an approach is suggested in the American Law Institute Model Penal Code (see Comment, § 2.03, pp. 133, 134 of Tentative Draft No. 4)." *Id.*, at 231–232, 342 N. Y. S. 2d, at 390.

The dissent did not cite any New York authority describing the causation instruction that should have been given.

[7] 35 N. Y. 2d, at 412, 321 N. E. 2d, at 776. The New York court added:

"We subscribe to the requirement that the defendants' actions must be *a sufficiently direct cause* of the ensuing death before there can be any imposition of criminal liability, and recognize, of course, that this standard is greater than that required to serve as a basis for tort liability. Applying these criteria to the defendants' actions, we conclude that their activities on the evening of December 30, 1970 were a sufficiently direct cause of the death of George Stafford so as to warrant the imposition of criminal sanctions. In engaging in what may properly be described as a despicable

Respondent then filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of New York, relying on 28 U. S. C. § 2254. The District Court held that the respondent's attack on the sufficiency of the charge failed to raise a question of constitutional dimension and that, without more, "the charge is not reviewable in a federal habeas corpus proceeding." App. 21.

The Court of Appeals for the Second Circuit reversed, 534 F. 2d 493 (1976). In view of the defense strategy which consistently challenged the sufficiency of the proof of causation, the majority held that the failure to make any objection to the jury instructions was not a deliberate bypass precluding federal habeas corpus relief,[8] but rather was an "obviously inadvertent" omission. *Id.*, at 497. On the merits, the court held that since the Constitution requires proof beyond a reasonable doubt of every fact necessary to constitute the crime, *In re Winship*, 397 U. S. 358, 364, the failure to instruct the jury on an essential element as complex as the causation issue in this case created an impermissible risk that the jury had not made a finding that the Constitution requires.[9]

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course of action, Kibbe and Krall left a helplessly intoxicated man without his eyeglasses in a position from which, because of these attending circumstances, he could not extricate himself and whose condition was such that he could not even protect himself from the elements. The defendants do not dispute the fact that their conduct evinced a depraved indifference to human life which created a grave risk of death, but rather they argue that it was just as likely that Stafford would be miraculously rescued by a good [S]amaritan. We cannot accept such an argument. There can be little doubt but that Stafford would have frozen to death in his state of undress had he remained on the shoulder of the road. The only alternative left to him was the highway, which in his condition, for one reason or another, clearly foreboded the probability of his resulting death." *Id.*, at 413, 321 N. E. 2d, at 776.

[8] Cf. *Humphrey* v. *Cady*, 405 U. S. 504, 517; *Fay* v. *Noia*, 372 U. S. 391, 427–428, 438–439.

[9] "The omission of any definition of causation, however, permitted the jury to conclude that the issue was not before them or that causation

Because the Court of Appeals decision appeared to conflict with this Court's holding in *Cupp* v. *Naughten*, 414 U. S. 141, we granted certiorari, 429 U. S. 815.

Respondent argues that the decision of the Court of Appeals should be affirmed on either of two independent grounds: (1) that the omission of an instruction on causation created the danger that the jurors failed to make an essential factual determination as required by *Winship;* or (2) assuming that they did reach the causation question, they did so without adequate guidance and might have rendered a different verdict under proper instructions. A fair evaluation of the omission in the context of the entire record requires rejection of both arguments.[10]

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could be inferred merely from the fact that Stafford's death succeeded his abandonment by Kibbe and Krall.

". . . The possibility that jurors, as laymen, may misconstrue the evidence before them makes mandatory in every case instruction as to the legal standards they must apply. . . . Error in the omission of an instruction is compounded where the legal standard is complex and requires that fine distinctions be made. That is most assuredly the situation in this case. It has been held that where death is produced by an intervening force, such as Blake's operation of his truck, the liability of one who put an antecedent force into action will depend on the difficult determination of whether the intervening force was a sufficiently independent or supervening cause of death. See W. LaFave & A. Scott, Criminal Law 257–263 (1972) (collecting cases). The few cases that provide similar factual circumstances suggest that the controlling questions are whether the ultimate result was foreseeable to the original actor and whether the victim failed to do something easily within his grasp that would have extricated him from danger." 534 F. 2d, at 498–499 (footnotes omitted).

In dissent, Judge Mansfield reasoned that the arguments of counsel, the reading of the statutory definition of the crime, and the general instructions made it clear to the jury that they had to find beyond a reasonable doubt that defendants' conduct was a direct cause of Stafford's death and that the death was not attributable solely to the truckdriver. Even though instructions on intervening cause might have been helpful, Judge Mansfield concluded that the omission was not constitutional error.

[10] "In determining the effect of this instruction on the validity of respondent's [state] conviction, we accept at the outset the well-established

I

The Court has held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship, supra,* at 364. One of the facts which the New York statute required the prosecution to prove is that the defendants' conduct caused the death of Stafford. As the New York Court of Appeals held, the evidence was plainly sufficient to prove that fact beyond a reasonable doubt. It is equally clear that the record requires us to conclude that the jury made such a finding.

There can be no question about the fact that the jurors were informed that the case included a causation issue that they had to decide. The element of causation was stressed in the arguments of both counsel. The statutory language, which the trial judge read to the jury, expressly refers to the requirement that defendants' conduct "cause[d] the death of another person." The indictment tracks the statutory language; it was read to the jurors and they were given a copy for use during their deliberations. The judge instructed the jury that all elements of the crime must be proved beyond a reasonable doubt. Whether or not the arguments of counsel correctly characterized the law applicable to the causation issue, they surely made it clear to the jury that such an issue

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proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. *Boyd* v. *United States,* 271 U. S. 104, 107 (1926). While this does not mean that an instruction by itself may never rise to the level of constitutional error, see *Cool* v. *United States,* 409 U. S. 100 (1972), it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." *Cupp* v. *Naughten,* 414 U. S. 141, 146–147.

had to be decided. It follows that the objection predicated on this Court's holding in *Winship* is without merit.

II

An appraisal of the significance of an error in the instructions to the jury requires a comparison of the instructions which were actually given with those that should have been given. Orderly procedure requires that the respective adversaries' views as to how the jury should be instructed be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error.[11] It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.[12]

The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal.[13] The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," *Cupp* v. *Naughten*, 414 U. S., at 147, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned,'" *id.*, at 146.

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[11] *Allis* v. *United States*, 155 U. S. 117, 122–123; *Harvey* v. *Tyler*, 2 Wall. 328, 339; see, *e. g.*, *Lopez* v. *United States*, 373 U. S. 427, 436.

[12] In *Namet* v. *United States*, 373 U. S. 179, 190, the Court characterized appellate consideration of a trial court error which was not obviously prejudicial and which the defense did not mention during the trial as "extravagant protection." See *Boyd* v. *United States*, 271 U. S. 104, 108.

[13] The strong interest in preserving the finality of judgments, see, *e. g.*, *Blackledge* v. *Allison*, *ante*, p. 83 (POWELL, J., concurring); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 256–266 (POWELL, J., concurring), as well as the interest in orderly trial procedure, must be overcome before collateral relief can be justified. For a collateral attack may be made many years after the conviction when it may be impossible, as a practical matter, to conduct a retrial.

In this case, the respondent's burden is especially heavy because no erroneous instruction was given; his claim of prejudice is based on the failure to give any explanation—beyond the reading of the statutory language itself—of the causation element. An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law. Since this omission escaped notice on the record until Judge Cardamone filed his dissenting opinion at the intermediate appellate level, the probability that it substantially affected the jury deliberations seems remote.

Because respondent did not submit a draft instruction on the causation issue to the trial judge, and because the New York courts apparently had no previous occasion to construe this aspect of the murder statute, we cannot know with certainty precisely what instruction should have been given as a matter of New York law. We do know that the New York Court of Appeals found no reversible error in this case; and its discussion of the sufficiency of the evidence gives us guidance about the kind of causation instruction that would have been acceptable.

The New York Court of Appeals concluded that the evidence of causation was sufficient because it can be said beyond a reasonable doubt that the "ultimate harm" was "something which should have been foreseen as being reasonably related to the acts of the accused." It is not entirely clear whether the court's reference to "ultimate harm" merely required that Stafford's death was foreseeable, or, more narrowly, that his death by a speeding vehicle was foreseeable.[14] In either event, the court was satisfied that the "ultimate harm" was one which "should have been foreseen." Thus, an adequate instruction would have told the jury that if the

[14] 35 N. Y. 2d, at 412–413, 321 N. E. 2d, at 776. The passage of the opinion quoted in n. 7, *supra*, emphasizes the obvious risk of death by freezing, suggesting that defendants need not have foreseen the precise manner in which the death did occur.

ultimate harm should have been foreseen as being reasonably related to defendants' conduct, that conduct should be regarded as having caused the death of Stafford.

The significance of the omission of such an instruction may be evaluated by comparison with the instructions that were given. One of the elements of respondent's offense is that he acted "recklessly," *supra*, at 148, 149. By returning a guilty verdict, the jury necessarily found, in accordance with its instruction on recklessness, that respondent was "aware of and consciously disregard[ed] a substantial and unjustifiable risk" [15] that death would occur. A person who is "aware of and consciously disregards" a substantial risk must also foresee the ultimate harm that the risk entails. Thus, the jury's determination that the respondent acted recklessly necessarily included a determination that the ultimate harm was foreseeable to him.

In a strict sense, an additional instruction on foreseeability would not have been cumulative because it would have related to an element of the offense not specifically covered in the instructions given. But since it is logical to assume that the jurors would have responded to an instruction on causation consistently with their determination of the issues that were comprehensively explained, it is equally logical to conclude that such an instruction would not have affected their verdict.[16] Accordingly, we reject the suggestion that the omission of more complete instructions on the causation issue "so

[15] *Supra*, at 149. In charging the jury on recklessness the trial judge quoted the statutory definition of that term in N. Y. Penal Law § 15.05 (3) (McKinney 1975).

[16] In fact, it is not unlikely that a complete instruction on the causation issue would actually have been favorable to the prosecution. For example, an instruction might have been patterned after the following example given in W. LaFave & A. Scott, Criminal Law 260 (1972):

"*A*, with intent to kill *B*, only wounds *B*, leaving him lying unconscious in the unlighted road on a dark night, and then *C*, driving along the road, runs over and kills *B*. Here *C*'s act is a matter of coincidence

infected the entire trial that the resulting conviction violated due process." Even if we were to make the unlikely assumption that the jury might have reached a different verdict pursuant to an additional instruction, that possibility is too speculative to justify the conclusion that constitutional error was committed.

The judgment is reversed.

It is so ordered.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I concur in the judgment, but I find it unnecessary to resolve the question of New York criminal law considered by the Court, *ante*, at 155–157. In my view, the federal court was precluded from granting respondent's petition for collateral relief under 28 U. S. C. § 2254 because he failed to object to the jury instructions at the time they were given. By that failure he waived any claim of constitutional error. This was precisely why the New York Court of Appeals refused to consider respondent's belated claim. Cf. *Henry* v. *Mississippi*, 379 U. S. 443 (1965).

This Court has held that under certain circumstances a defendant's failure to comply with state procedural requirements will not be deemed a waiver of federal constitutional rights, unless it is shown that such bypass was the result of a deliberate tactical decision. See *Fay* v. *Noia*, 372 U. S. 391 (1963); *Humphrey* v. *Cady*, 405 U. S. 504 (1972). These

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rather than a response to what *A* has done, and thus the question is whether the subsequent events were foreseeable, as they undoubtedly were in the above illustration."

Such an instruction would probably have been more favorable to the prosecution than the instruction on recklessness which the court actually gave.

cases, however, involved *post*-trial omissions of a technical nature which would be unlikely to jeopardize substantial state interests. *Mid*trial omissions such as occurred in this case, on the other hand, are substantially different. "It is one thing to fail to utilize the [state] appeal process to cure a defect which already inheres in a judgment of conviction, but it is quite another to forgo making an objection or exception which might prevent the error from ever occurring." *Mullaney* v. *Wilbur*, 421 U. S. 684, 704 n. (1975) (REHNQUIST, J., concurring);* see *Estelle* v. *Williams*, 425 U. S. 501, 513–514 (1976) (POWELL, J., concurring). Thus, by failing to object to the jury charge, respondent injected into the trial process the very type of error which the objection requirement was designed to avoid. Federal courts may not overlook such failure on collateral attack.

The "deliberate bypass" doctrine of *Fay* v. *Noia*, *supra*, should not be extended to midtrial procedural omissions which impair substantial state interests. I would simply hold that the United States District Court was barred from examining the substance of respondent's constitutional claim, and rest our reversal of the Court of Appeals on that ground.

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*This is not a case such as *Mullaney*, where the State's highest court ruled on the defendant's claim even though he failed to raise the issue at trial. Rather, as the Court notes, *ante*, at 150, the New York Court of Appeals here expressly refused to rule on the adequacy of the charge because respondent failed to object in the trial court.

CHAPPELLE *v.* GREATER BATON ROUGE AIRPORT DISTRICT ET AL.

ON APPEAL FROM THE COURT OF APPEAL OF LOUISIANA FOR THE FIRST CIRCUIT

No. 76-352. Argued April 25, 1977—Decided May 16, 1977

329 So. 2d 810, reversed.

Herschel C. Adcock argued the cause and filed a brief for appellant.

Joseph F. Keogh argued the cause and filed a brief for appellees.

PER CURIAM.

The judgment is reversed. *Turner* v. *Fouche*, 396 U. S. 346, 361–364 (1970).

MR. JUSTICE REHNQUIST, dissenting.

Appellant, E. C. Chappelle, Jr., wished to serve, upon appointment, as a commissioner on the Greater Baton Rouge Airport Commission. He, however, was deemed not qualified since, at the time of his appointment, he owned no "property assessed in East Baton Rouge Parish," as required by Louisiana Act 151 of 1969. The sole requirement is that he own property, whether real or personal, that is assessed in that parish. We sit to judge the constitutionality, not the wisdom, of this restriction. I am unable to agree that the Constitution, or prior cases from this Court, require today's declaration of unconstitutionality.

This Court has regularly sustained the imposition of city or county residency requirements on municipal employees. *McCarthy* v. *Philadelphia Civil Serv. Comm'n*, 424 U. S. 645 (1976); *Detroit Police Officers Assn.* v. *Detroit*, 405 U. S. 950 (1972); see also *Bute* v. *Quinn*, 535 F. 2d 1285 (CA7), cert.

denied, 429 U. S. 1027 (1976). It is dubious at best whether the requirement that a public officeholder own *any* assessable property within a parish is any more burdensome, or any less rational, than a requirement that he and his family *live* in that parish.

This Court has also sustained durational residency requirements of five and seven years for candidates for the office of state governor and senator, *Kanapaux* v. *Ellisor*, 419 U. S. 891 (1974); *Sununu* v. *Stark*, 420 U. S. 958 (1975). If a State can impose a five-year residency requirement on its candidates for its highest political office, it should be able to impose a minimal locational property requirement on persons seeking office in this airport district.

The Louisiana Court of Appeal concluded:

> "In enacting Act 151 of 1969, the legislature sought to insure that the members of the commission would have a substantial interest in performing their duties effectively and conscientiously. The legislature could have concluded reasonably that property owners of East Baton Rouge Parish would have that interest." App. 22–23.

Surely it was as reasonable to conclude so in this case as it is in situations involving residency, or durational residency, requirements. Since I believe today's opinion is inconsistent with these cases, and since, in light of these later cases, I would not extend *Turner* v. *Fouche*, 396 U. S. 346, 361–364 (1970), I respectfully dissent.

TEXAS v. LOUISIANA

No. 36, Orig. Decided June 14, 1976—Decree entered May 16, 1977

Opinion reported: 426 U. S. 465.

DECREE

For the purpose of giving effect to the opinion of this Court announced on June 14, 1976, 426 U. S. 465:

IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the extension of the boundary southerly from the point where the line forming the boundary between Texas and Louisiana southerly from the Arkansas boundary, intersects the geographical middle of the Sabine River (Latitude 31°59′ 56.225″ North, Longitude 94°02′33.105″ West, said point being taken from the United States Geological Survey Quadrangle Center, Tex.-La. 1958 Edition) to the mid-point between the gulfward extension of the Sabine Pass jetties Latitude 29°38′37.329″ North, Longitude 93°49′30.940″ West hereby is established.

Said boundary commences at Latitude 31°59′56.225″ North and Longitude 94°02′33.105″ West, thence proceeding in a southerly direction along the Sabine River using the federal line as shown for the boundary on the United States Geological Survey Quadrangle Center, Tex.-La., 1958 Edition (photorevised 1969) and signed by Hatley N. Harrison, Jr., for Louisiana on February 20, 1974, and by H. H. Forbes, Jr., for Texas on February 20, 1974, which is in evidence in this case as Texas Exhibit AAA–1.

Thence, on the United States Geological Survey Quadrangle Logansport, La.-Tex. Edition of 1956 (photorevised 1969) and signed by Hatley N. Harrison, Jr., for Louisiana on February 20, 1974, and Herman H. Forbes, Jr. for Texas on February 20, 1974, which is in evidence in this case as Texas Exhibit AAA–2, using the federal line as shown along the

Sabine River as the boundary except for the alignments shown in red. These red alignments denote where the boundary follows old oxbows that formerly were the Sabine River and are located in the vicinity of:

LATITUDE NORTH	*LONGITUDE WEST*
31°54′36″	93°55′51″
31°53′45″	93°55′54″
31°53′34″	93°54′02″
31°50′20″	93°52′38″
31°49′22″	93°52′09″
31°47′27″	93°50′05″
31°47′04″	93°50′05″
31°46′16″	93°49′30″

Thence, on the United States Geological Survey Quadrangle Patroon, Tex.-La., Edition of 1956 (photorevised 1969) and signed by Hatley N. Harrison, Jr., for Louisiana on February 20, 1974, and by Herman H. Forbes, Jr. for Texas on February 20, 1974, which is in evidence in this case as Texas Exhibit AAA–3, using the federal line as shown along the Sabine River as the boundary except for the former alignments shown in red. These are located in the vicinity of:

LATITUDE NORTH	*LONGITUDE WEST*
31°42′06″	93°48′50″
31°41′12″	93°48′37″
31°36′52″	93°49′33″
31°31′44″	93°45′19″

Thence, on the United States Geological Survey Quadrangle Zwolle, La.-Tex., Edition of 1957 (photorevised 1969) and signed by Hatley N. Harrison, Jr., for Louisiana on February 20, 1974, and by Herman H. Forbes, Jr., for Texas on February 20, 1974, which is in evidence in this case as Texas Exhibit AAA–4, using the federal line as shown along the Sabine River as the boundary except for the former alignment shown in red. It is located in the vicinity of Latitude 31°31′50″ North and Longitude 93°45′00″ West.

Thence, on the United States Geological Survey Quadrangle

Negreet, La.-Tex., Edition of 1954 (photorevised 1969) and signed by Hatley N. Harrison, Jr. for Louisiana, on February 20, 1974 and by Herman H. Forbes, Jr. for Texas on February 20, 1974, which is in evidence in this case as Texas Exhibit AAA–5, using the federal line as shown along the Sabine River as the boundary.

Thence, on the United States Geological Survey Quadrangle Weirgate, Tex.-La., Edition of 1954 (photorevised 1969) and signed by Hatley N. Harrison, Jr. for Louisiana on March 29, 1974, and by Herman H. Forbes, Jr. for Texas on April 5, 1974, which is in evidence in this case as Texas Exhibit AAA–6, using the federal line as shown along the Sabine River as the boundary except for the former alignments shown in red. These are located in the vicinity of:

LATITUDE NORTH	*LONGITUDE WEST*
31°11′12″	93°33′10″
31°04′16″	93°32′03″
31°00′14″	93°34′10″

Thence, on the United States Geological Survey Quadrangle Merryville, Tex.-La., Edition of 1959 signed by Hatley N. Harrison, Jr. for Louisiana on February 20, 1974, and by Herman H. Forbes, Jr. for Texas, on February 20, 1974, which is in evidence in this case as Texas Exhibit AAA–7, using the federal line as shown along the Sabine River as the boundary except for the former alignments shown in red. These are located in the vicinity of:

LATITUDE NORTH	*LONGITUDE WEST*
30°50′39″	93°33′37″
30°45′18″	93°36′23″

Thence, on the United States Geological Survey Quadrangle Bon Weir, La.-Tex., Edition of 1959 signed by Hatley N. Harrison, Jr. for Louisiana on February 20, 1974, and by Herman H. Forbes, Jr. for Texas, on February 20, 1974, which is in evidence in this case as Texas Exhibit AAA–8, using the federal line as shown along the Sabine River as the boundary

except for the former alignments shown in red. These are located in the vicinity of:

LATITUDE NORTH	*LONGITUDE WEST*
30°43′27″	93°36′47″
30°38′14″	93°40′40″
30°34′49″	93°42′42″
30°34′40″	93°43′13″
30°30′38″	93°42′28″

Thence, on the United States Geological Survey Quadrangle Starks, La.-Tex. Edition of 1959 (photorevised 1967) and the United States Geological Survey Quadrangle Bessmay, Tex.-La., Edition of 1955, each signed by Hatley N. Harrison, Jr., for Louisiana on February 20, 1974, and by Herman H. Forbes, Jr., for Texas on February 20, 1974, which are in evidence in this case as Texas Exhibits AAA–9 and AAA–10, using the federal line as shown along the Sabine River as the boundary except for the former alignments shown in red. These are located in the vicinity of:

LATITUDE NORTH	*LONGITUDE WEST*
30°23′40″	93°44′36″
30°19′17″	93°45′21″
30°18′40″	93°44′37″
30°16′58″	93°42′12″
30°15′25″	93°42′08″

Thence, on the United States Geological Survey Quadrangle Orange, La.-Tex., Edition of 1960 signed by Hatley N. Harrison, Jr., for Louisiana, on March 29, 1974, and by Herman H. Forbes, Jr., for Texas, on May 20, 1974, which is in evidence in this case as Texas Exhibit AAA–11, using the federal line as shown along the Sabine River as the boundary except for the former alignments shown in red. These are located in the vicinity of:

LATITUDE NORTH	*LONGITUDE WEST*
30°12′11″	93°42′46″
30°11′38″	93°42′33″
30°06′04″	93°42′37″
30°05′09″	93°43′49″

Thence, on the United States Geological Survey Quadrangle, Orangefield, Tex.-La., Edition of 1957 signed by Hatley N. Harrison, Jr., for Louisiana, on February 20, 1974, and by Herman H. Forbes, Jr., for Texas, on February 20, 1974, which is in evidence in this case as Texas Exhibit AAA–12, using the federal line shown along the Sabine River as the boundary to a point on the geographic middle of the Sabine River whose position is Latitude 30°00′00.000″ North and Longitude 93°46′07.952″ West.

And thence, as shown on Exhibit 13, which is in evidence herein, the boundary from the point last mentioned through Middle Pass at the mouth of the Sabine River and through Sabine Lake and Pass to the seaward end of the jetties is defined by straight lines between points in either Louisiana (Lambert) Coordinate System, South Zone, or Texas (Lambert) Coordinate System, South Central Zone, whose geographic positions are as follows:

	Latitude North	*Longitude West*	*Location*
COMMENCE AT	30°00′00.000″	93°46′07.952″	River
THROUGH	29°59′51.826″	93°46′09.068″	Head of Pass
THROUGH	29°59′47.316″	93°46′13.110″	River
THROUGH	29°59′43.790″	93°46′18.996″	River
THROUGH	29°59′42.357″	93°46′24.193″	River
THROUGH	29°59′41.976″	93°46′31.407″	River
THROUGH	29°59′41.857″	93°46′36.751″	River
THROUGH	29°59′41.098″	93°46′41.339″	River
THROUGH	29°59′36.127″	93°46′53.104″	River
THROUGH	29°59′34.754″	93°46′57.677″	Head of Pass
THROUGH	29°59′13.842″	93°47′27.465″	Middle Pass
THROUGH	29°59′00.673″	93°47′36.676″	Middle Pass
THROUGH	29°58′50.683″	93°47′43.561″	Middle Pass
THROUGH	29°58′43.739″	93°47′48.469″	Upper Sabine Lake
THROUGH	29°58′37.530″	93°47′54.478″	Upper Sabine Lake
THROUGH	29°58′30.922″	93°48′09.976″	Upper Sabine Lake
THROUGH	29°58′03.916″	93°48′20.679″	Upper Sabine Lake
THROUGH	29°56′49.422″	93°48′31.283″	Upper Sabine Lake
THROUGH	29°56′23.803″	93°48′37.697″	Upper Sabine Lake
THROUGH	29°56′19.089″	93°48′43.491″	Upper Sabine Lake
THROUGH	29°56′11.739″	93°48′47.345″	Upper Sabine Lake

	Latitude North	*Longitude West*	*Location*
THROUGH	29°55′57.322″	93°48′50.454″	Upper Sabine Lake
THROUGH	29°55′03.827″	93°49′04.810″	Upper Sabine Lake
THROUGH	29°54′36.973″	93°49′16.302″	Upper Sabine Lake
THROUGH	29°54′04.585″	93°49′37.656″	Upper Sabine Lake
THROUGH	29°53′32.579″	93°50′03.845″	Upper Sabine Lake
THROUGH	29°52′56.560″	93°50′21.747″	Upper Sabine Lake
THROUGH	29°52′39.770″	93°50′35.039″	Upper Sabine Lake
THROUGH	29°52′25.145″	93°51′09.699″	Middle of Sabine Lake
THROUGH	29°51′50.473″	93°52′07.103″	Lower Sabine Lake
THROUGH	29°51′32.542″	93°52′28.004″	Lower Sabine Lake
THROUGH	29°51′15.878″	93°52′57.568″	Lower Sabine Lake
THROUGH	29°51′05.200″	93°53′19.673″	Lower Sabine Lake
THROUGH	29°50′54.303″	93°53′35.182″	Lower Sabine Lake
THROUGH	29°50′18.169″	93°54′20.311″	Lower Sabine Lake
THROUGH	29°49′49.772″	93°54′49.448″	Lower Sabine Lake
THROUGH	29°49′44.849″	93°54′58.065″	Lower Sabine Lake
THROUGH	29°49′37.618″	93°55′05.771″	Lower Sabine Lake
THROUGH	29°49′20.303″	93°55′20.142″	Lower Sabine Lake
THROUGH	29°48′42.959″	93°55′35.809″	Lower Sabine Lake
THROUGH	29°48′18.451″	93°55′40.759″	Lower Sabine Lake
THROUGH	29°47′36.545″	93°55′39.194″	Lower Sabine Lake
THROUGH	29°47′15.758″	93°55′30.254″	Lower Sabine Lake
THROUGH	29°47′05.436″	93°55′18.919″	Lower Sabine Lake
THROUGH	29°46′58.740″	93°55′01.889″	Lower Sabine Lake
THROUGH	29°46′48.210″	93°54′46.996″	Lower Sabine Lake
THROUGH	29°46′36.049″	93°54′25.832″	Lower Sabine Lake
THROUGH	29°46′28.073″	93°54′13.425″	Lower Sabine Lake
THROUGH	29°46′18.585″	93°53′57.291″	Lower Sabine Lake
THROUGH	29°46′06.942″	93°53′45.018″	Sabine Pass
THROUGH	29°45′54.345″	93°53′30.849″	Sabine Pass
THROUGH	29°45′49.978″	93°53′28.808″	Sabine Pass
THROUGH	29°45′38.577″	93°53′26.928″	Sabine Pass
THROUGH	29°45′18.638″	93°53′33.851″	Sabine Pass
THROUGH	29°45′05.648″	93°53′32.213″	Sabine Pass
THROUGH	29°44′54.133″	93°53′31.124″	Sabine Pass
THROUGH	29°44′43.478″	93°53′28.071″	Sabine Pass
THROUGH	29°44′35.209″	93°53′18.953″	Sabine Pass
THROUGH	29°44′31.543″	93°53′11.427″	Sabine Pass
THROUGH	29°44′27.961″	93°53′02.088″	Sabine Pass
THROUGH	29°44′22.581″	93°52′40.847″	Sabine Pass

	Latitude North	*Longitude West*	*Location*
THROUGH	29°44′11.018″	93°52′03.826″	Sabine Pass
THROUGH	29°44′04.304″	93°51′54.092″	Sabine Pass
THROUGH	29°43′54.534″	93°51′48.229″	Sabine Pass
THROUGH	29°43′37.354″	93°51′40.499″	Sabine Pass
THROUGH	29°43′32.000″	93°51′35.690″	Sabine Pass
THROUGH	29°43′16.198″	93°51′23.209″	Sabine Pass
THROUGH	29°43′07.451″	93°51′24.917″	Sabine Pass
THROUGH	29°42′58.535″	93°51′25.146″	Sabine Pass
THROUGH	29°42′52.596″	93°51′22.444″	Sabine Pass
THROUGH	29°42′37.071″	93°51′08.441″	Sabine Pass
THROUGH	29°42′25.303″	93°51′02.416″	Sabine Pass
THROUGH	29°42′17.991″	93°50′56.448″	Sabine Pass
THROUGH	29°42′11.305″	93°50′52.934″	Sabine Pass
THROUGH	29°41′57.311″	93°50′47.841″	Head of Jetties
THROUGH	29°41′15.323″	93°50′11.722″	Jetties
TO	29°38′37.329″	93°49′30.940″	End of Jetties

2. That the offshore lateral boundary between the States of Texas and Louisiana seaward from the point Latitude 29°38′ 37.329″ North, Longitude 93°49′30.940″ West (end of jetties) is a line running South-Southeasterly from said point on a constant bearing of South 13°44′45.8″ east true to the seaward limit of Louisiana's Submerged Lands Act grant. Texas' historic boundary then continues offshore on the same bearing to the point Latitude 29°32′06.784″ North, Longitude 93°47′ 41.699″ West. This offshore lateral boundary and the Texas historical boundary are shown upon Exhibit 14 which is in evidence in this case.

3. That the United States holds no title to or interest in any island in the west half of the Sabine River by virtue of that island's continuous existence since 1848, when the western half of that River was part of the territory of the United States, but not part of Texas. Louisiana does not hold title to or interest in any island in the west half of the Sabine River. The United States and Texas do not hold title to or interest in any island in the east half of the Sabine River.

4. That Exhibits 1–14, in evidence herein and above mentioned, be certified by the Special Master as delineating the

boundary between the State of Texas and the State of Louisiana, from Latitude 32° North, as defined herein, to the seaward limits of Louisiana's Submerged Land Act grant, and the seaward limits of Texas' historical boundary, as defined herein, and that the State of Louisiana be directed to deposit a copy of these maps, so certified by the Special Master, along with a certified copy of this decree, with the Register of the State Land Office for the State of Louisiana, and that the State of Texas be directed to deposit a set of these maps, so certified by the Special Master, along with a certified copy of this decree, with the Commissioner of the General Land Office of the State of Texas.

5. That the costs be taxed to the parties in accordance with their contribution to the fund established by the Special Master, and that no costs be taxed for the services of the Special Master.

6. That any unexpended funds contributed by the parties to the Special Master for necessary expenses be returned to the parties.

7. That upon such return of funds the Honorable Robert Van Pelt, the Special Master appointed in this cause, will have completed his duties, and is thereupon discharged.

PRESSLER, MEMBER, U. S. HOUSE OF REPRESENTATIVES *v.* BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 76-1005. Decided May 16, 1977

District Court's judgment dismissing complaint challenging constitutionality of certain provisions of Postal Revenue and Federal Salary Act of 1967 and 1975 Executive Salary Cost-of-Living Adjustment Act, is vacated and case is remanded for further consideration in light of intervening amendment to PRFSA.

428 F. Supp. 302, vacated and remanded.

PER CURIAM.

The motion of We the People for leave to file a brief, as *amicus curiae*, is granted. The motion of James W. Jeffords, et al., for leave to file a brief, as *amici curiae*, is granted.

Appellant challenges the operation of certain provisions of the Postal Revenue and Federal Salary Act of 1967, 2 U. S. C. §§ 351–361, and of the 1975 Executive Salary Cost-of-Living Adjustment Act, 2 U. S. C. § 31 (1970 ed., Supp. V), relating to increases in salaries paid members of Congress. He asserts that the operation of these Acts violates Art. I, § 1, and § 6, cl. 1 (the Ascertainment Clause), of the Constitution.

On April 4, 1977, Congress passed an amendment to the Postal Revenue and Federal Salary Act. On April 12, the President signed that amendment into law. Pub. L. 95–19, 91 Stat. 45.

It appearing that the amendment to the Postal Revenue and Federal Salary Act will alter materially the scope and perhaps the nature of appellant's suit, the judgment of the District

Court is vacated, and the case is remanded to that court for further consideration in the light of the new legislation.

It is so ordered.

MR. JUSTICE STEVENS would affirm the judgment dismissing the complaint.

Per Curiam

ASHCROFT, ATTORNEY GENERAL OF MISSOURI v. MATTIS

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 76-1179. Decided May 16, 1977

Once the District Court had decided that the defendant police officers were not liable in appellee's suit against them for shooting and killing his son in an attempted escape from arrest, the suit no longer presented a live "case or controversy" entitling appellee to a declaratory judgment as to the constitutionality of Missouri statutes permitting police to use deadly force in apprehending a felon, and hence this Court is unable to consider the merits of the Court of Appeals' holding that such statutes were unconstitutional. Any emotional satisfaction that appellee would obtain from a ruling that his son's death was wrongful is not enough to meet the case-or-controversy requirement.

547 F. 2d 1007, vacated and remanded.

PER CURIAM.

Appellee's 18-year-old son was shot and killed by police while attempting to escape arrest. Appellee filed suit under 42 U. S. C. § 1983 against the police officers in the United States District Court for the Eastern District of Missouri. He sought to recover damages, and also to obtain a declaratory judgment that the Missouri statutes authorizing the police action were unconstitutional.[1] The District Court held that a defense of good faith had been established, and denied both forms of relief. No appeal was taken from the denial of damages, but appellee did seek review of the denial of declaratory relief. The Eighth Circuit held that declaratory relief was available and remanded for consideration of

[1] These statutes permit police to use deadly force in apprehending a person who has committed a felony, following notice of the intent to arrest. Mo. Rev. Stat. §§ 559.040 and 544.190 (1969); see *Mattis* v. *Schnarr*, 502 F. 2d 588, 591, and n. 4 (CA8 1974).

the merits of the constitutional issue. *Mattis* v. *Schnarr*, 502 F. 2d 588 (1974).

On remand, appellee filed an amended complaint, in which he made no claim for damages. The Missouri Attorney General was allowed to intervene in defense of the statutes, and the case was then submitted on stipulated facts. The District Court upheld the statutes, *Mattis* v. *Schnarr*, 404 F. Supp. 643 (1975), but was reversed by a divided Court of Appeals, sitting en banc, 547 F. 2d 1007 (1976). The Attorney General brought an appeal under 28 U. S. C. § 1254 (2) from the holding that the state statutes were unconstitutional.

Although we are urged to consider the merits of the Court of Appeals' holding, we are unable to do so, because this suit does not now present a live "case or controversy." This suit was brought to determine the police officers' liability for the death of appellee's son. That issue has been decided, and there is no longer any possible basis for a damages claim. Nor is there any possible basis for a declaratory judgment. For a declaratory judgment to issue, there must be a dispute which "calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 242 (1937). See also *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941). Here, the District Court was asked to answer the hypothetical question whether the defendants would have been liable apart from their defense of good faith. No "present right" of appellee was at stake. Indeed, appellee's primary claim of a present interest in the controversy is that he will obtain emotional satisfaction from a ruling that his son's death was wrongful.[2] Appellee's

[2] The second amended complaint also alleges that appellee has another son who "*if* ever arrested or brought under an attempt at arrest on suspicion of a felony, *might* flee or give the appearance of fleeing, and would therefore be *in danger* of being killed by these defendants or other police officers . . . ." 3 App. in *Mattis* v. *Schnarr*, No. 75–1849 (CA8), p. 5

Motion to Affirm 5–6, n. 1. Emotional involvement in a lawsuit is not enough to meet the case-or-controversy requirement; were the rule otherwise, few cases could ever become moot.

The judgment of the Court of Appeals is vacated, and the case is remanded with instructions to direct the District Court to dismiss the second amended complaint.

It is so ordered.

(emphasis added). Such speculation is insufficient to establish the existence of a present, live controversy.

UNITED STATES *v.* WONG

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-635. Argued December 6, 1976—Decided May 23, 1977

A witness who, while under investigation for possible criminal activity, is called to testify before a grand jury and is later indicted for perjury in the testimony given before the grand jury, is not entitled to suppression of the false testimony on the ground that no effective warning of the Fifth Amendment privilege to remain silent had been given. Pp. 177–180.

(a) The Fifth Amendment testimonial privilege does not condone perjury, which is not justified by even the predicament of being forced to choose between incriminatory truth and falsehood, as opposed to a refusal to answer. *United States* v. *Knox*, 396 U. S. 77; *United States* v. *Mandujano*, 425 U. S. 564. Pp. 178–179.

(b) Nor do Fifth Amendment due process requirements require suppression, since even where searching questions are made of a witness uninformed of the Fifth Amendment privilege of silence, "[o]ur legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *Bryson* v. *United States*, 396 U. S. 64, 72. Pp. 179–180.

553 F. 2d 576, reversed and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

William F. Sheehan III argued the cause for the United States. On the brief were *Solicitor General Bork*, *Assistant Attorney General Thornburgh*, and *Deputy Solicitor General Frey*.

Allan Brotsky argued the cause and filed a brief for respondent.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether a witness who, while under investigation for possible criminal activity, is

called to testify before a grand jury and who is later indicted for perjury committed before the grand jury, is entitled to have the false testimony suppressed on the ground that no effective warning of the Fifth Amendment privilege to remain silent was given.[1]

(1)

Rose Wong, the respondent, came to the United States from China in early childhood. She was educated in public schools in San Francisco, where she completed eight grades of elementary education. Because her husband does not speak English, respondent generally speaks in her native tongue in her household.

In September 1973 respondent was subpoenaed to testify before a federal grand jury in the Northern District of California. The grand jury was investigating illegal gambling and obstruction of state and local law enforcement in San Francisco. At the time of her grand jury appearance, the Government had received reports that respondent paid bribes to two undercover San Francisco police officers and agreed to make future payments to them. Before any interrogation began, respondent was advised of her Fifth Amendment privilege;[2] she then denied having given money

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[1] In *United States* v. *Mandujano*, 425 U. S. 564 (1976), we held that false testimony by a grand jury witness suspected by federal prosecutors of criminal involvement was admissible in a subsequent perjury trial. Although the witness in *Mandujano* had been warned of the Fifth Amendment privilege, the Court of Appeals had mandated suppression of the perjurious testimony on the ground that the witness had not been provided with full *Miranda* warnings. In this Court, three separate opinions expressed varying reasons, but all eight participating Justices agreed that the perjured testimony was improperly suppressed.

[2] The prosecutor gave respondent the following warnings:

"You . . . need not answer any question which you feel may . . . incriminate you. . . . [Y]ou [have] the right to refuse to answer any question which you feel might incriminate you. . . . [I]f you do give an answer, that answer may be used against you in a subsequent criminal

or gifts to police officers or having discussed gambling activities with them. It is undisputed that this testimony was false.

(2)

Respondent was indicted for perjury in violation of 18 U. S. C. § 1623. She moved to dismiss the indictment on the ground that, due to her limited command of English, she had not understood the warning of her right not to answer incriminating questions. At a suppression hearing, defense counsel called an interpreter and two language specialists as expert witnesses and persuaded the District Judge that respondent had not comprehended the prosecutor's explanation of the Fifth Amendment privilege;[3] the court accepted respondent's testimony that she had thought she was required to answer all questions. Based upon informal oral findings to this effect, the District Court ordered the testimony suppressed as evidence of perjury.

Accepting the District Court's finding that respondent had not understood the warning, the Court of Appeals held that due process required suppression where "the procedure employed by the government was fraught with the danger . . . of placing [respondent] in the position of either perjuring or incriminating herself." 553 F. 2d 576, 578 (CA9 1974). Absent

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prosecution, if in fact the Government should decide to prosecute you for any crime. . . . You also have the right to consult with an attorney prior to answering any question here today. . . . [I]f you cannot afford an attorney, . . . we would see that an attorney is afforded to represent you. . . . [I]f you do answer any questions and should you knowingly give any false testimony, or false answers to any questions, you would be subject to prosecution for the crime of perjury under the Federal Laws." 2 Tr. 52–53.

[3] The District Court found, however, that respondent understood the oath and the consequences of giving false testimony, and that she understood the questions that were asked of her. Thus, no issue regarding the due process consequences, if any, of the absence of either factor was addressed by the District Court or the Court of Appeals.

effective warnings of the right to remain silent, the court concluded, a witness suspected of criminal involvement by the Government will "not understand the right to remain silent, and [will] be compelled by answering to subject himself to criminal liability." *Ibid.* In the Court of Appeals' view, the ineffectiveness of the prosecutor's warning meant that "the unfairness of the procedure remained undissipated, and due process requires the testimony be suppressed." *Id.*, at 579.

Following our decision in *United States* v. *Mandujano*, 425 U. S. 564 (1976), we granted certiorari. 426 U. S. 905 (1976). We now reverse.

(3)

Under findings which the Government does not challenge, respondent, in legal effect, was unwarned of her Fifth Amendment privilege. Resting on the finding that no effective warning was given, respondent contends that both the Fifth Amendment privilege and Fifth Amendment due process require suppression of her false testimony. As to her claim under the Fifth Amendment testimonial privilege, respondent argues that, without effective warnings, she was in effect forced by the Government to answer all questions, and that her choice was confined either to incriminating herself or lying under oath. From this premise, she contends that such testimony, even if knowingly false, is inadmissible against her as having been obtained in violation of the constitutional privilege. With respect to her due process claim, she contends, and the Court of Appeals held,[4] that, absent warnings, a witness is placed in the dilemma of engaging either in self-incrimination or perjury, a situation so inherently unfair as to

[4] The Court of Appeals rejected respondent's argument that the Fifth Amendment privilege required suppression. The court held:

"[T]he privilege against self-incrimination does not afford a defense to a witness under compulsion who, rather than refusing to answer (or, if improperly compelled to answer, giving incriminating answers), gives false testimony." 553 F. 2d 576, 577.

require suppression of perjured testimony. We reject both contentions.

As our holding in *Mandujano* makes clear, and indeed as the Court of Appeals recognized, the Fifth Amendment privilege does not condone perjury. It grants a privilege to remain silent without risking contempt, but it "does not endow the person who testifies with a license to commit perjury." *Glickstein* v. *United States*, 222 U. S. 139, 142 (1911). The failure to provide a warning of the privilege, in addition to the oath to tell the truth, does not call for a different result. The contention is that warnings inform the witness of the availability of the privilege and thus eliminate the claimed dilemma of self-incrimination or perjury. Cf. *Garner* v. *United States*, 424 U. S. 648, 657–658 (1976). However, in *United States* v. *Knox*, 396 U. S. 77 (1969), the Court held that even the predicament of being forced to choose between incriminatory truth and falsehood, as opposed to refusing to answer, does not justify perjury. In that case, a taxpayer was charged with filing false information on a federal wagering tax return. At the time of the offense, federal law commanded the filing of a tax return even though the effect of that requirement, in some circumstances, was to make it a crime not to supply the requested information to the Government.[5] To justify the deliberate falsehood contained in his tax return, Knox, like respondent here, argued that the false statements were not made voluntarily, but were compelled by the tax laws and therefore violated the Fifth Amendment. The Court rejected that contention. Although it recognized that tax laws which compelled filing the returns injected an "element of pressure into Knox's predicament at the time he filed the forms," *id.*, at 82, the Court held that by answering falsely the taxpayer

[5] Knox filed the false return prior to this Court's decisions in *Marchetti* v. *United States*, 390 U. S. 39 (1968), and *Grosso* v. *United States*, 390 U. S. 62 (1968).

took "a course that the Fifth Amendment gave him no privilege to take." *Ibid.*

In this case respondent stands in no better position than Knox; her position, in fact, is weaker since her refusal to give inculpatory answers, unlike *Knox*, would not have constituted a crime. It follows that our holding in *Mandujano*, that the Fifth Amendment privilege does not protect perjury, is equally applicable to this case.

(4)

Respondent also relies on the Court of Appeals' holding that the failure to inform a prospective defendant of the constitutional privilege of silence at the time of a grand jury appearance is so fundamentally unfair as to violate due process. In the Court of Appeals' view, the Government's conduct in this case, although in good faith, so thwarted the adversary model of our criminal justice system as to require suppression of the testimony in any subsequent perjury case based on the falsity of the sworn statement.[6] We disagree.

First, the "unfairness" urged by respondent was also present in the taxpayer's predicament in *Knox*, yet the Court there found no constitutional infirmity in the taxpayer's conviction for making false statements on his returns. Second, accepting, *arguendo*, respondent's argument as to the dilemma posed in the grand jury procedures here,[7] perjury is nevertheless not a permissible alternative. The "unfairness" perceived by respondent is not the act of calling a prospective defendant to testify before a grand jury[8] but rather the failure effec-

[6] The Court of Appeals did not suggest why, assuming a due process violation had occurred, suppression of respondent's testimony was constitutionally required.

[7] Cf. *United States* v. *Mandujano*, 425 U. S., at 594–598 (BRENNAN, J., concurring in judgment).

[8] There is no constitutional prohibition against summoning potential defendants to testify before a grand jury. *United States* v. *Dionisio*, 410 U. S. 1, 10 n. 8 (1973); *United States* v. *Mandujano*, *supra*, at 584 n. 9,

tively to inform a prospective defendant of the Fifth Amendment privilege. Thus, the core of respondent's due process argument, and of the Court of Appeals' holding, in reality relates to the protection of values served by the Fifth Amendment privilege, a privilege which does not protect perjury.

Finally, to characterize these proceedings as "unfair" by virtue of inadequate Fifth Amendment warnings is essentially to say that the Government acted unfairly or oppressively by asking searching questions of a witness uninformed of the privilege. But, as the Court has consistently held, perjury is not a permissible way of objecting to the Government's questions. "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." (Footnote omitted.) *Bryson* v. *United States*, 396 U. S. 64, 72 (1969); *United States* v. *Mandujano*, 425 U. S., at 577, 585 (BRENNAN, J., concurring in judgment); *id.*, at 609 (STEWART, J., concurring in judgment). Indeed, even if the Government could, on pain of criminal sanctions, compel an answer to its incriminating questions, a citizen is not at liberty to answer falsely. *United States* v. *Knox*, *supra*, at 82–83. If the citizen answers the question, the answer must be truthful.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

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594 (BRENNAN, J., concurring in judgment). The historic availability of the Fifth Amendment privilege in grand jury proceedings, *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892), attests to the Court's recognition that potentially incriminating questions will frequently be asked of witnesses subpoenaed to testify before the grand jury; the very purpose of the inquiry is to ferret out criminal conduct, and sometimes potentially guilty persons are prime sources of information.

UNITED STATES *v.* WASHINGTON

CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 74–1106. Argued December 6, 1976—Decided May 23, 1977

Respondent, who was suspected, with others, of possible implication in a theft, was subpoenaed to appear as a witness before the District of Columbia grand jury investigating the crime. The prosecutor did not advise respondent before his appearance that he might be indicted for the theft, but respondent was given a series of warnings after being sworn, including the warning that he had a right to remain silent. Respondent nevertheless testified, and subsequently was indicted for the theft. The trial court granted respondent's motion to suppress his grand jury testimony and to quash the indictment on the ground that it was based on evidence obtained in violation of his Fifth Amendment privilege against compelled self-incrimination. The District of Columbia Court of Appeals affirmed the suppression order, holding that "the most significant failing of the prosecutor was in not advising [respondent] that he was a potential defendant" and that "[a]nother shortcoming was in the prosecutor's waiting until after administering the oath in the cloister of the grand jury before undertaking to furnish what advice was given." *Held:* Respondent's grand jury testimony may properly be used against him in a subsequent trial. The comprehensive warnings he received, whether or not such warnings were constitutionally required, dissipated any element of compulsion to self-incrimination that might otherwise have been present. The fact that a subpoenaed grand jury witness is a putative or potential defendant neither impairs nor enlarges his constitutional rights, and hence it is unnecessary to give such a defendant the warnings that the Court of Appeals held were required. Pp. 186–190.

328 A. 2d 98, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 191.

William F. Sheehan III argued the cause for the United States. With him on the brief were *Solicitor General Bork*,

Assistant Attorney General Thornburgh, Deputy Solicitor General Frey, and *Sidney M. Glazer.*

Frederick H. Weisberg argued the cause for respondent. With him on the brief were *Robert M. Weinberg* and *Mervin N. Cherrin.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented in this case is whether testimony given by a grand jury witness suspected of wrongdoing may be used against him in a later prosecution for a substantive criminal offense when the witness was not informed in advance of his testimony that he was a potential defendant in danger of indictment.[1]

(1)

The facts are not in dispute. Zimmerman and Woodard were driving respondent's van truck when a Washington, D. C., policeman stopped them for a traffic offense. Seeing a motorcycle in the rear of the van which he identified as stolen, the officer arrested both men and impounded respondent's vehicle. When respondent came to reclaim the van, he told police that Zimmerman and Woodard were friends who were driving the van with his permission.

He explained the presence of the stolen motorcycle by saying that while driving the van himself he had stopped to assist an unknown motorcyclist whose machine had broken down. Respondent then allowed the motorcycle to be placed in his van to take it for repairs. Soon after this the van stalled and he walked to a nearby gasoline station to call Zimmerman and Woodard for help, leaving the van with the unknown

[1] With *United States* v. *Mandujano,* 425 U. S. 564 (1976), and *United States* v. *Wong, ante,* p. 174, we have settled that grand jury witnesses, including those already targeted for indictment, may be convicted of perjury on the basis of their false grand jury testimony even though they were not first advised of their Fifth Amendment privilege against compelled self-incrimination.

motorcyclist. After reaching Zimmerman by phone, respondent waited at the gasoline station for his friends, then returned to the spot he had left the van when they failed to appear; by that time the van had disappeared. Respondent said he was not alarmed, assuming his friends had repaired the van and driven it away. Shortly thereafter, Zimmerman and Woodard were arrested with the stolen motorcycle in the van.

Not surprisingly, the officer to whom respondent related this tale was more than a little skeptical; he told respondent he did not believe his story, and advised him not to repeat it in court, "because you're liable to be in trouble if you [do so]." The officer also declined to release the van. Respondent then repeated this story to an Assistant United States Attorney working on the case. The prosecutor, too, was dubious of the account; nevertheless, he released the van to respondent. At the same time, he served respondent with a subpoena to appear before the grand jury investigating the motorcycle theft.

When respondent appeared before the grand jury, the Assistant United States Attorney in charge had not yet decided whether to seek an indictment against him. The prosecutor was aware of respondent's explanation, and was also aware of the possibility that respondent could be indicted by the grand jury for the theft if his story was not believed.

The prosecutor did not advise respondent before his appearance that he might be indicted on a criminal charge in connection with the stolen motorcycle. But respondent, after reciting the usual oath to tell the truth, was given a series of other warnings, as follows:

> "Q . . . .
>
> "You have a right to remain silent. You are not required to say anything to us in this Grand Jury at any time or to answer any question.[2]

[2] This was an obvious overstatement of respondent's constitutional rights; the very purpose of the grand jury is to elicit testimony, and it can

"Anything you say can be used against you in Court.

"You have the right to talk to a lawyer for advice before we question you and have him outside the Grand Jury during any questioning.

"If you cannot afford a lawyer and want one a lawyer will be provided for you.

"If you want to answer questions now without a lawyer present you will still have the right to stop answering at any time.

"You also have the right to stop answering at any time until you talk to a lawyer.

"Now, do you understand those rights, sir?

"A Yes, I do.

"Q And do you want to answer questions of the Grand Jury in reference to a stolen motorcycle that was found in your truck?

"A Yes, sir.

"Q And do you want a lawyer here or outside the Grand Jury room while you answer those questions?

"A No, I don't think so."

In response to questions, respondent again related his version of how the stolen motorcycle came to be in the rear of his van. Subsequently, the grand jury indicted respondent, Zimmerman, and Woodard for grand larceny and receiving stolen property.

Respondent moved to suppress his testimony and quash the indictment, arguing that it was based on evidence obtained in violation of his Fifth Amendment privilege against compelled self-incrimination. The Superior Court for the District of

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compel answers, by use of contempt powers, to all except self-incriminating questions.

After the oral warnings, respondent was also handed a card containing all the warnings prescribed by *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and a waiver form acknowledging that the witness waived the privilege against compelled self-incrimination. Respondent signed the waiver.

Columbia suppressed the testimony and dismissed the indictment, holding that before the Government could use respondent's grand jury testimony at trial, it had first to demonstrate that respondent had knowingly waived his privilege against compelled self-incrimination. Notwithstanding the comprehensive warnings described earlier, the court found no effective waiver had been made, holding that respondent was not properly advised of his Fifth Amendment rights. The court thought the Constitution required, at a minimum, that

> "inquiry be made of the suspect to determine what his educational background is, and what his formal education is and whether or not he understands that this is a constitutional privilege and whether he fully understands the consequences of what might result in the event that he does waive his constitutional right and in the event that he does make incriminatory statements . . . ."

The court also held that respondent should have been told that his testimony could lead to his indictment by the grand jury before which he was testifying, and could then be used to convict him in a criminal prosecution.

The District of Columbia Court of Appeals affirmed the suppression order. 328 A. 2d 98 (1974).[3] That court also took the position that "the most significant failing of the prosecutor was in not advising [respondent] that he was a potential defendant. Another shortcoming was in the prosecutor's waiting until after administering the oath in the cloister

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[3] The Court of Appeals declined to dismiss the indictment, however, relying on a line of cases in this Court holding that an indictment returned by a properly constituted grand jury is not subject to challenge on the ground that it was based on unconstitutionally obtained evidence. See *United States* v. *Calandra*, 414 U. S. 338 (1974); *United States* v. *Blue*, 384 U. S. 251 (1966); *Lawn* v. *United States*, 355 U. S. 339 (1958). Respondent's cross-petition seeking review of this portion of the Court of Appeals' ruling was denied, 426 U. S. 905 (1976), and the validity of the indictment is not an issue in this case.

of the grand jury before undertaking to furnish what advice was given." *Id.*, at 100.[4]

(2)

The implicit premise of the District of Columbia Court of Appeals' holding is that a grand jury inquiry, like police custodial interrogation, is an "interrogation of persons suspected or accused of crime [that] contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda* v. *Arizona*, 384 U. S. 436, 467 (1966). But this Court has not decided that the grand jury setting presents coercive elements which compel witnesses to incriminate themselves. Nor have we decided whether any Fifth Amendment warnings whatever are constitutionally required for grand jury witnesses; moreover, we have no occasion to decide these matters today, for even assuming that the grand jury setting exerts some pressures on witnesses generally or on those who may later be indicted, the comprehensive warnings respondent received in this case plainly satisfied any possible claim to warnings. Accordingly, respondent's grand jury testimony may properly be used against him in a subsequent trial for theft of the motorcycle.

Although it is well settled that the Fifth Amendment privilege extends to grand jury proceedings, *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892), it is also axiomatic that the Amendment does not automatically preclude self-incrimination, whether spontaneous or in response to questions put by government officials. "It does not preclude

[4] Though both courts below found no effective waiver of Fifth Amendment rights, neither court found, and no one suggests here, that respondent's signing of the waiver-of-rights form was involuntary or was made without full appreciation of all the rights of which he was advised. The Government does not challenge, and we do not disturb, the finding that at the time of his grand jury appearance respondent was a potential defendant whose indictment was considered likely by the prosecution.

a witness from testifying voluntarily in matters which may incriminate him," *United States* v. *Monia*, 317 U. S. 424, 427 (1943), for "those competent and freewilled to do so may give evidence against the whole world, themselves included." *United States* v. *Kimball*, 117 F. 156, 163 (CC SDNY 1902); accord, *Miranda*, *supra*, at 478; *Michigan* v. *Tucker*, 417 U. S. 433 (1974); *Hoffa* v. *United States*, 385 U. S. 293 (1966). Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. In addition to guaranteeing the right to remain silent unless immunity is granted, the Fifth Amendment proscribes only self-incrimination obtained by a "genuine compulsion of testimony." *Michigan* v. *Tucker*, *supra*, at 440. Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions. Accordingly, unless the record reveals some compulsion, respondent's incriminating testimony cannot conflict with any constitutional guarantees of the privilege.[5]

The Constitution does not prohibit every element which influences a criminal suspect to make incriminating admissions. See *Garner* v. *United States*, 424 U. S. 648 (1976), *Beckwith* v. *United States*, 425 U. S. 341 (1976); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 223–227 (1973). Of course, for many witnesses the grand jury room engenders an atmosphere conducive to truthtelling, for it is likely that upon being brought

[5] In *Miranda*, the Court saw as inherently coercive any police custodial interrogation conducted by isolating the suspect with police officers; therefore, the Court established a *per se* rule that all incriminating statements made during such interrogation are barred as "compelled." All *Miranda*'s safeguards, which are designed to avoid the coercive atmosphere, rest on the overbearing compulsion which the Court thought was caused by isolation of a suspect in police custody. See *Oregon* v. *Mathiason*, 429 U. S. 492 (1977); *Beckwith* v. *United States*, 425 U. S. 341 (1976); *Garner* v. *United States*, 424 U. S. 648, 653–654 (1976); *Michigan* v. *Tucker*, 417 U. S., at 444.

before such a body of neighbors and fellow citizens, and having been placed under a solemn oath to tell the truth, many witnesses will feel obliged to do just that. But it does not offend the guarantees of the Fifth Amendment if in that setting a witness is more likely to tell the truth than in less solemn surroundings. The constitutional guarantee is only that the witness be not *compelled* to give self-incriminating testimony. The test is whether, considering the totality of the circumstances, the free will of the witness was overborne. *Rogers* v. *Richmond,* 365 U. S. 534, 544 (1961).

(3)

After being sworn, respondent was explicitly advised that he had a right to remain silent and that any statements he did make could be used to convict him of crime. It is inconceivable that such a warning would fail to alert him to his right to refuse to answer any question which might incriminate him. This advice also eliminated any possible compulsion to self-incrimination which might otherwise exist. To suggest otherwise is to ignore the record and reality. Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled. Moreover, any possible coercion or unfairness resulting from a witness' misimpression that he must answer truthfully even questions with incriminatory aspects is completely removed by the warnings given here. Even in the presumed psychologically coercive atmosphere of police custodial interrogation, *Miranda* does not require that any additional warnings be given simply because the suspect is a potential defendant; indeed, such suspects are potential defendants more often than not. *United States* v. *Binder,* 453 F. 2d 805, 810 (CA2 1971), cert. denied, 407 U. S. 920 (1972).

Respondent points out that unlike one subject to custodial interrogation, whose arrest should inform him only too clearly that he is a potential criminal defendant, a grand jury witness

may well be unaware that he is targeted for possible prosecution. While this may be so in some situations, it is an overdrawn generalization. In any case, events here clearly put respondent on notice that he was a suspect in the motorcycle theft. He knew that the grand jury was investigating that theft and that his involvement was known to the authorities. Respondent was made abundantly aware that his exculpatory version of events had been disbelieved by the police officer, and that his friends, whose innocence his own story supported, were to be prosecuted for the theft. The interview with the prosecutor put him on additional notice that his implausible story was not accepted as true. The warnings he received in the grand jury room served further to alert him to his own potential criminal liability. In sum, by the time he testified respondent knew better than anyone else of his potential defendant status.

However, all of this is largely irrelevant, since we do not understand what constitutional disadvantage a failure to give potential defendant warnings could possibly inflict on a grand jury witness, whether or not he has received other warnings. It is firmly settled that the prospect of being indicted does not entitle a witness to commit perjury, and witnesses who are not grand jury targets are protected from compulsory self-incrimination to the same extent as those who are. Because target witness status neither enlarges nor diminishes the constitutional protection against compelled self-incrimination, potential-defendant warnings add nothing of value to protection of Fifth Amendment rights.

Respondent suggests he must prevail under *Garner* v. *United States, supra.* There, the petitioner was charged with a gambling conspiracy. As part of its case, the Government introduced Garner's income tax returns, in one of which he had identified his occupation as "professional gambler," and in all of which he had reported substantial income from wagering. The Court recognized that Garner was indeed compelled by law to file a tax return, but held that this did not

constitute compelled self-incrimination. The Court noted that Garner did not claim his Fifth Amendment privilege, instead making the incriminating disclosure that he was a professional gambler. *Garner* holds that the Self-Incrimination Clause is violated only when the Government compels disclosures which it knows will incriminate the declarant—that is, only when it intentionally places the individual under "compulsions to incriminate, not merely compulsions to make unprivileged disclosures." 424 U. S., at 657. But the distinction between compulsion to incriminate and compulsion to disclose what the Government is entitled to know is of no help to respondent; in this case there was no compulsion to do either.

In *Beckwith* v. *United States*, decided shortly after *Garner*, we reaffirmed the need for showing overbearing compulsion as a prerequisite to a Fifth Amendment violation. There, the Government agent interrogated the taxpayer for the explicit purpose of securing information that would incriminate him. There, as here, the interrogation was not conducted in an inherently coercive setting; hence the claim of compelled self-incrimination was rejected.[6]

(4)

Since warnings were given, we are not called upon to decide whether such warnings were constitutionally required. How-

[6] Although the District of Columbia Court of Appeals rested its holding solely on the Self-Incrimination Clause of the Fifth Amendment, respondent urges the Fifth Amendment Due Process Clause. He contends it is fundamentally unfair to elicit incriminating testimony from a potential defendant without first informing him of his target status. This, it is argued, would alert the witness more pointedly so as to enable him to decide whether to invoke the privilege against compelled self-incrimination. This line of argument simply restates respondent's claims under the Self-Incrimination Clause and is rejected for the same reasons. Moreover, there is no evidence of any governmental misconduct which undermined the fairness of the proceedings.

ever, the District of Columbia Court of Appeals held that whatever warnings are required are insufficient if given "in the cloister of the grand jury." 328 A. 2d, at 100. That court gave no reason for its view that warnings must be given outside the presence of the jury, but respondent now advances two justifications. First, it could be thought that warnings given to respondent before the grand jury came too late, because of the short time to assimilate their significance, and because of the presence of the grand jurors. But respondent does not contend that he did not understand the warnings given here. In any event, it is purely speculative to attribute any such effects to warnings given in the presence of the jury immediately before taking the stand. If anything, the proximity of the warnings to respondent's testimony and the solemnity of the grand jury setting seem likely to increase their effectiveness.

Second, respondent argues that giving the oath in the presence of the grand jury undermines assertion of the Fifth Amendment privilege by placing the witness in fear that the grand jury will infer guilt from invocation of the privilege. But this argument entirely overlooks that the grand jury's historic role is as an investigative body; it is not the final arbiter of guilt or innocence. Moreover, it is well settled that invocation of the Fifth Amendment privilege in a grand jury proceeding is not admissible in a criminal trial, where guilt or innocence is actually at stake.

The judgment of the Court of Appeals is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

The general rule that a witness must affirmatively claim the privilege against compulsory self-incrimination must in my

view admit of an exception in the case of a grand jury witness whom the prosecutor interrogates with the express purpose of getting evidence upon which to base a criminal charge against him. In such circumstances, even warnings, before interrogation, of his right to silence do not suffice. The privilege is emptied of substance unless the witness is further advised by the prosecutor that he is a potential defendant. Only if the witness then nevertheless intentionally and intelligently waives his right to be free from compulsory self-incrimination and submits to further interrogation should use of his grand jury testimony against him be sanctioned. As I stated in *United States* v. *Mandujano*, 425 U. S. 564, 598-600 (1976) (concurring in judgment):

> "I would hold that, in the absence of an intentional and intelligent waiver by the individual of his known right to be free from compulsory self-incrimination, the Government may not call before a grand jury one whom it has probable cause—as measured by an objective standard—to suspect of committing a crime, and by use of judicial compulsion compel him to testify with regard to that crime. In the absence of such a waiver, the Fifth Amendment requires that any testimony obtained in this fashion be unavailable to the Government for use at trial. Such a waiver could readily be demonstrated by proof that the individual was warned prior to questioning that he is currently subject to possible criminal prosecution for the commission of a stated crime . . . ."

In this case, although respondent Washington was advised of his rights to silence and to talk to a lawyer before he appeared before the grand jury, he was "only told that he was needed as a witness in prosecuting the two who were occupants of the van at the time of its impoundment." 328 A. 2d 98, 100 (1974). He was never told that he was in danger of being indicted himself, even though "at the time of his grand jury appearance respondent was a potential defendant whose

indictment was considered likely by the prosecution." *Ante*, at 186 n. 4.

The ancient privilege of a witness against being compelled to incriminate himself is precious to free men as a shield against high-handed and arrogant inquisitorial practices. It has survived centuries of controversies, periodically kindled by popular impatience that its protection sometimes allows the guilty to escape punishment. But it has endured as a wise and necessary protection of the individual against arbitrary power, and the price of occasional failures of justice is paid in the larger interest of general personal security.

I would hold that a failure to warn the witness that he is a potential defendant is fatal to an indictment of him when it is made unmistakably to appear, as here, that the grand jury inquiry became an investigation directed against the witness and was pursued with the purpose of compelling him to give self-incriminating testimony upon which to indict him. I would further hold that without such prior warning and the witness' subsequent voluntary waiver of his privilege, there is such gross encroachment upon the witness' privilege as to render worthless the values protected by it unless the self-incriminating testimony is unavailable to the Government for use at any trial brought pursuant to even a valid indictment.

It should be remarked that, of course, today's decision applies only to application of the privilege against self-incrimination secured by the Fifth Amendment to the United States Constitution.* The holding does not affect the authority of state courts to construe counterpart provisions of state constitutions—even identically phrased provisions—"to give the individual greater protection than is provided" by the

*Of course, it is still open to the District of Columbia Court of Appeals, under its supervisory powers, on remand to order and enforce compliance with what it considers proper procedures before the grand jury, *Ristaino* v. *Ross*, 424 U. S. 589, 597 n. 9 (1976); *United States* v. *Jacobs*, 547 F. 2d 772 (CA2 1976), cert. pending, No. 76-1193.

federal provision. *State* v. *Johnson*, 68 N. J. 349, 353, 346 A. 2d 66, 67–68 (1975). See generally Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977).

A number of state courts have recognized that a defendant or potential defendant called before a grand jury is privileged against the State's using his self-incriminating testimony to procure an indictment or using it to introduce against him at trial, even in the absence of an affirmative claim of his privilege against self-incrimination. See, *e. g.*, *People* v. *Laino*, 10 N. Y. 2d 161, 176 N. E. 2d 571 (1961); *State* v. *Fary*, 19 N. J. 431, 437–438, 117 A. 2d 499, 503 (1955); *Taylor* v. *Commonwealth*, 274 Ky. 51, 118 S. W. 2d 140 (1938); *State* v. *Corteau*, 198 Minn. 433, 270 N. W. 144 (1936); *Culbreath* v. *State*, 22 Ala. App. 143, 113 So. 465 (1927). See additional cases in Annot., Privilege Against Self-incrimination as to Testimony before Grand Jury, 38 A. L. R. 2d 225, 290–294 (1954). One court has specifically held that interrogating a potential defendant "under [the] guise of examining him as to the guilt of someone else" is a violation of the defendant's privilege against self-incrimination. *People* v. *Cochran*, 313 Ill. 508, 526, 145 N. E. 207, 214 (1924). See also Newman, The Suspect and the Grand Jury: A Need for Constitutional Protection, 11 U. Rich. L. Rev. 1 (1976); Comment, The Grand Jury Witness' Privilege Against Self-Incrimination, 62 Nw. U. L. Rev. 207, 223 (1967); Meshbesher, Right to Counsel before Grand Jury, 41 F. R. D. 189, 191 (1966). The rationale of these decisions—which I would find applicable to the case now before us—is that where the grand jury investigation is in fact a proceeding against the witness, or even if begun as a general investigation it becomes a proceeding against the witness, the encroachment upon the witness' privilege requires that a court deny to the prosecution the use of the witness' self-incriminating testimony.

Syllabus

TERRITORY OF GUAM *v.* OLSEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76–439. Argued March 29, 1977—Decided May 23, 1977

Provision of § 22 of the 1950 Organic Act of Guam that the District Court of Guam "shall have such appellate jurisdiction as the [Guam] legislature may determine" *held* not to authorize the Guam Legislature to divest the District Court's appellate jurisdiction under the Act to hear appeals from local Guam courts, and to transfer that jurisdiction to the newly created Guam Supreme Court, but to empower the legislature to "determine" that jurisdiction only in the sense of the selection of what should constitute appealable causes. This conclusion is supported not only by the text of § 22, which expressly authorizes only a "transfer" of the District Court's original local jurisdiction, but also by the absence of any clear signal from Congress that it intended to allow the Guam Legislature to foreclose appellate review by Art. III courts, including this Court, of territorial courts' decisions in federal-question cases; by the Act's legislative history; and by the fact that if the word "determine" were read as giving Guam the power to transfer the District Court's appellate jurisdiction to the Guam Supreme Court and at the same time to authorize Guam to deny review of the District Court's decisions by any Art. III tribunal, Congress would have given Guam a power not granted to any other Territory. Pp. 199–204.

540 F. 2d 1011, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which STEWART, REHNQUIST, and STEVENS, JJ., joined, *post*, p. 204.

Charles H. Troutman, Attorney General of Guam, argued the cause for petitioner. With him on the briefs was *Charles D. Stake*, Assistant Attorney General.

Howard Trapp argued the cause for respondent. With him on the brief were *Laurence Vogel* and *Norman Dorsen*.

Walter S. Ferenz argued the cause and filed a brief for the Guam Bar Assn. as *amicus curiae* urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question for decision in this case is whether the provision of § 22 of the 1950 Organic Act of Guam that the District Court of Guam "shall have such appellate jurisdiction as the [Guam] legislature may determine" authorizes the Legislature of Guam to divest the appellate jurisdiction of the District Court under the Act to hear appeals from local Guam courts, and to transfer that jurisdiction to the Supreme Court of Guam, newly created by the Guam Legislature.

I

Section 22 (a) of the Organic Act, 64 Stat. 389, before an amendment not relevant here, provided:

> "There is hereby created a court of record to be designated the 'District Court of Guam,' and the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as may have been or may hereafter be established by the laws of Guam. The District Court of Guam shall have, in all causes arising under the laws of the United States, the jurisdiction of a district court of the United States as such court is defined in section 451 of title 28, United States Code, *and shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such appellate jurisdiction as the legislature may determine.* The jurisdiction of and the procedure in the courts of Guam other than the District Court of Guam shall be prescribed by the laws of Guam." [1] (Emphasis supplied.)

[1] The "District Court of Guam" rather than "United States District Court of Guam" was chosen as the court's title, since it was created under

In 1951, under the authority of the Organic Act, the Guam Legislature created three local courts for local matters and defined cases appealable from those courts to the District Court.[2] That structure continued without substantial change for 23 years until 1974 when the Guam Legislature adopted the Court Reorganization Act of 1974. Guam Pub. L. 12–85. The former Island, Police, and Commissioners' Courts, were replaced by a Guam Superior Court with "original jurisdiction in all cases arising under the laws of Guam, civil or criminal, in law or equity, regardless of the amount in controversy, except for causes arising under the Constitution, treaties, laws of the United States and any matter involving the Guam Territorial Income Tax." [3] The Act also repealed the provisions of the Guam Code of Civil Procedure governing appeals to the District Court,[4] and created the Supreme Court of

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Art. IV, § 3, of the Federal Constitution rather than under Art. III, and since § 22 vested the court with original jurisdiction to decide both local and federal-question matters. S. Rep. No. 2109, 81st Cong., 2d Sess., 12 (1950).

[2] The local courts were the Commissioners' Courts, the Police Court, and the Island Court. Guam Code Civ. Proc. § 81–278 (1953).

The District Court was vested with a wide-ranging appellate jurisdiction respecting criminal and civil decisions of the Island Court. §§ 62, 63, 82. A single judge constituted the District Court as a trial court. However, § 65 constituted the appellate division as a court of three judges. Congress approved this measure in a 1958 amendment to § 22 of the Act, 72 Stat. 178. See *Corn* v. *Guam Coral Co.*, 318 F. 2d 622, 627 (CA9 1963); letter of Judge Albert B. Maris, judicial advisor to Guam, to Chairman, Committee on Interior and Insular Affairs, House of Representatives, Mar. 14, 1957, reproduced in S. Rep. No. 1582, 85th Cong., 2d Sess., 7–9 (1958); *id.*, at 4–5.

[3] The Court of Appeals for the Ninth Circuit held that the Superior Court's original jurisdiction is exclusive and not concurrent with the District Court. *Agana Bay Dev. Co. (Hong Kong) Ltd.* v. *Supreme Court of Guam*, 529 F. 2d 952, 955 n. 4 (1976). This holding is not contested here.

[4] The Code of Civil Procedure provisions repealed by the Court Reorganization Act had provided that the District Court "shall have jurisdic-

Guam. The Act transferred to the Supreme Court essentially the same appellate jurisdiction as had previously been exercised by the District Court, providing that the Supreme Court "shall have jurisdiction of appeals from the judgments, orders and decrees of the Superior Court in criminal cases . . . and in civil causes." Pub. L. 12–85, § 3. Other provisions of the Reorganization Act amended various territorial laws to change the references to the Supreme Court of Guam from the Appellate Division of the District Court as the appellate court.

Respondent was convicted of criminal charges in the Superior Court, and appealed to the District Court of Guam. The District Court dismissed the appeal on the authority of a divided panel decision of the Court of Appeals for the Ninth Circuit holding that the 1974 Court Reorganization Act validly divested the District Court of its appellate jurisdiction and transferred that jurisdiction to the newly created Supreme Court. *Agana Bay Dev. Co. (Hong Kong) Ltd.* v. *Supreme Court of Guam*, 529 F. 2d 952 (1976). In this case, however, the Court of Appeals for the Ninth Circuit, overruled en banc [5] the panel decision in *Agana Bay*, and reversed the dismissal of respondent's appeal. 540 F. 2d 1011 (1976). The Court of Appeals held that "the appellate jurisdiction of the district court may not be transferred without congressional authorization and pursuant to such provisions and safeguards as Congress may provide." *Id.*, at 1012. Certain judgments of the appellate division of the District Court were made appealable to the Court of Appeals for the Ninth Circuit, and to this Court, by § 23 of the Organic Act of Guam of 1950, as

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tion of appeals from the judgments, orders and decrees of the Island Court in criminal causes as provided in the Penal Code, Part II, Title VIII, and in civil causes . . . ." Guam Code Civ. Proc. § 63 (1953).

[5] The Court of Appeals convened en banc after respondent unsuccessfully sought certiorari before judgment in this Court. 425 U. S. 960 (1976).

amended, 65 Stat. 726,[6] but Congress has not similarly provided for appeals from judgments of the Supreme Court of Guam. In that circumstance, the Court of Appeals held that § 22 (a) did not authorize the transfer of the District Court's appellate jurisdiction to the Supreme Court of Guam because, under existing statutes "litigation in the territorial court [that] may involve substantial federal questions . . . cannot be reviewed by the United States Supreme Court or by any other Article III court . . . ." 540 F. 2d, at 1012. We granted certiorari, 429 U. S. 959 (1976). We affirm.

II

We emphasize at the outset that the 1974 Court Reorganization Act in no respect affects the exclusive [7] original federal-

[6] Section 23 (a), as enacted in 1950, authorized appeals from final judgments of the District Court of Guam to the Court of Appeals in federal question, habeas corpus, and "all other civil cases where the value in controversy exceed[ed] $5,000 . . . ." Congress repealed this provision in 1951, 65 Stat. 729, but transferred its coverage to 28 U. S. C. § 1291 and thus expanded appealability to criminal cases raising only issues of local law, and to civil cases raising only issues of local law with value in controversy of less than $5,000. 65 Stat. 726. Review of certain interlocutory orders was also authorized by including the District Court of Guam within the coverage of 28 U. S. C. § 1292. 65 Stat. 726. See S. Rep. No. 1020, 82d Cong., 1st Sess., 16 (1951).

Under § 23 (b) as enacted in 1950 direct appeals from the District Court to this Court were available in cases to which the United States was a party and in which the District Court held an Act of Congress unconstitutional. This provision was continued without significant change in 1951 by including the District Court of Guam within the coverage of 28 U. S. C. § 1252. 65 Stat. 726.

[7] The Organic Act of 1950 does not on its face require that the original jurisdiction of the District Court over questions arising under federal law be exclusive, but the implementing legislation passed by Guam in 1951 left federal-question jurisdiction exclusively in the District Court by granting jurisdiction to the Guam courts only over cases arising under local law. Guam Code Civ. Proc. §§ 82, 102, 112 (1953). This interpretation in *Agana Bay Dev. Co. (Hong Kong) Ltd.* v. *Supreme Court of Guam*, *supra*, at 954, is also not contested here. See n. 3, *supra*.

question jurisdiction of the District Court granted by the first clause of the second sentence of § 22 (a), which now provides that the "District Court of Guam shall have the jurisdiction of a district court of the United States in all causes arising under the constitution, treaties, and laws of the United States . . . ." 48 U. S. C. § 1424 (a). Decisions in such cases brought in the District Court are appealable to the Court of Appeals for the Ninth Circuit or to this Court.[8] The question presented for decision here rather concerns appeals to the District Court from decisions of local courts in cases arising under local law. The language we must construe immediately follows in the same sentence, providing that the District Court "shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been *transferred by the legislature to other court or courts established by it*, and shall have such appellate jurisdiction as the legislature may *determine*." (Emphasis supplied.)

We first observe that Congress used different language in its grant of power to the Guam Legislature over the District Court's original jurisdiction from its grant of power over that court's appellate jurisdiction. The Act expressly provides that original jurisdiction might be *"transferred"* to "other court or courts" created by the legislature. As to appellate jurisdiction, however, the wording is that the District Court "shall have such appellate jurisdiction as the legislature may *determine*." The question immediately arises why, if Congress contemplated authority to eliminate the District Court's appellate jurisdiction by transferring it to a local court, Congress did not, as in the case of "original jurisdiction," explicitly provide that appellate jurisdiction too might be *"transferred."* Moreover, if Congress contemplated such a broad grant of authority, it might be expected that it would have referred, as in the case of original jurisdiction, to "other court or courts" that would be established to assume the appellate jurisdiction

[8] See n. 6, *supra*.

transferred from the District Court. Clearly, the word "determine" is not used as a synonym for "transfer," and it is not obvious that the power to "determine" the appellate jurisdiction of the District Court includes the power to abolish it by "transfer" to another court. We fully agree with Judge Kennedy dissenting in *Agana Bay*, 529 F. 2d, at 959, that Congress used "determine" because Congress "more likely intended to permit the local legislature to decide what cases were serious enough to be appealable," and we note that the Guam Legislature found no broader authority in the term for the 23 years from 1951 to 1974. We therefore conclude that Congress expressly authorized a "transfer" of the District Court's original jurisdiction but withheld a like power respecting the court's appellate jurisdiction, empowering Guam to "determine" the District Court's appellate jurisdiction only in the sense of the selection of what should constitute appealable causes.[9]

Other considerations besides our reading of the bare text support the conclusion that the power to "determine" should not be construed to include the power to "transfer" without more persuasive indicia of a congressional purpose to clothe the Guam Legislature with this authority.

First, we should be reluctant without a clear signal from Congress to conclude that it intended to allow the Guam Legislature to foreclose appellate review by Art. III courts, including this Court, of decisions of territorial courts in cases that may turn on questions of federal law. Important federal issues can be presented in cases which do not fall within the District Court's federal-question jurisdiction, because they do not "arise under" federal law, but instead fall within the exclusive jurisdiction vested in the Superior and Supreme Courts by the Reorganization Act. For example, criminal convic-

[9] This case does not present, and we intimate no view upon, the question of what categories of cases the Guam Legislature is authorized to determine are nonappealable under § 22 of the Act.

tions returned in the Superior Court and appealable under the Court Reorganization Act only to the Supreme Court, may be challenged as violating federal constitutional guarantees. It is no answer that rejection of a federal constitutional defense by the Guam courts, though not presently directly reviewable by the Court of Appeals for the Ninth Circuit or by this Court, may nevertheless be reviewable in federal habeas corpus. Tr. of Oral Arg. 9. Habeas corpus review has different historical roots from direct review and different jurisprudential functions and limitations. See, *e. g.*, *Fay* v. *Noia*, 372 U. S. 391 (1963). As respects civil cases, though the "arising under" jurisdiction vested in the District Court by § 22 (a) tracks the general federal-question statute, 28 U. S. C. § 1331 (a), clearly—whatever may be the ambiguities of the phrase "arising under"—it does not embrace all civil cases that may present questions of federal law. See, *e. g.*, *Gully* v. *First Nat. Bank*, 299 U. S. 109 (1936); Cohen, The Broken Compass: The Requirement that a Case Arise "Directly" under Federal Law, 115 U. Pa. L. Rev. 890 (1967). We are therefore reluctant to conclude that, merely because power to "determine" may as a matter of dictionary definition include power to "transfer," Congress intended to confer on the Guam Legislature the power to eliminate review in Art. III courts of all federal issues presented in cases brought in the local courts.

Second, nothing in the legislative history of the Organic Act of 1950 even remotely suggests that Congress intended by its use of the word "determine" to give the Guam Legislature the option of creating a local Supreme Court having the power of ultimate review of cases involving local matters. Rather, the legislative history points the other way. Three bills introduced in the 81st Congress provided for a judicial system for Guam. Hearings on S. 185, S. 1892, and H. R. 7273 before the Subcommittee of the Senate Committee on Interior and Insular Affairs, 81st Cong., 2d Sess., 1–25 (1950) (hereafter Hearings). All three provided for appellate review by Art. III

courts of territorial court decisions. The bill that became the Organic Act, H. R. 7273, originally established a Supreme Court of Guam whose decisions were to be reviewable by the Court of Appeals for the Ninth Circuit and by this Court. Hearings 22–23. The proposal for a congressionally created Supreme Court was rejected in favor of a Federal District Court. This was done in part to provide "litigants in the Western Pacific with direct access to the federal court system." *Agana Bay Dev. Co., Ltd.* v. *Supreme Court of Guam, supra,* at 961 (Kennedy, J., dissenting); S. Rep. No. 2109, 81st Cong., 2d Sess., 4 (1950). But another concern accounts for the provision giving the District Court jurisdiction in local matters. Our independent review of the pertinent legislative materials confirms, and we therefore adopt, Judge Kennedy's conclusion expressed in dissent in *Agana Bay, supra,* at 961:

> "Because of concern that there would not be sufficient federal question litigation to justify a separate district court in Guam, the court was given original jurisdiction in local matters. It was also envisioned that the district court would serve as an appellate body once local courts were established. The apparent reason for eliminating the provision for a local supreme court was to avoid duplicative judicial machinery, rather than to allow local authorities to put certain controversies beyond review by the federal court system."

Third, if the word "determine" is to be read as giving Guam the power to transfer the District Court's appellate jurisdiction to the Supreme Court and, by the same stroke, to authorize Guam to deny review of the court's decisions by any Art. III tribunal, Congress has given Guam a power not granted any other Territory. Congress has consistently provided for appellate review by Art. III courts of decisions of local courts of the other Territories.[10] What history there

[10] See, *e. g.*, 31 Stat. 141 (§ 86), 36 Stat. 1087, 43 Stat. 936 (Hawaii); 31 Stat. 321 (§§ 504, 507) (Alaska); 31 Stat. 77 (§ 35), 38 Stat. 803, 39

is points to a purpose to create a similar system for Guam. Hearings, *supra;* S. Rep. No. 2109, 81st Cong., 2d Sess. (1950). We are unwilling to say that Congress made an extraordinary exception in the case of Guam, at least without some clearer indication of that purpose than the word "determine" provides. Moreover, we should hesitate to attribute such a purpose to Congress since a construction that denied Guam litigants access to Art. III courts for appellate review of local-court decisions might present constitutional questions. See generally Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953).

Affirmed.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE STEWART, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS join, dissenting.

Although this case may at first glance seem unimportant to anyone but the residents of Guam, the result of the Court's

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Stat. 951 (§§ 42, 43) (Puerto Rico); 76A Stat. 51 (Canal Zone); 39 Stat. 1132 (§ 2), 43 Stat. 936, 49 Stat. 1807 (§§ 25, 30), 48 U. S. C. § 1612, 90 Stat. 2899 (Virgin Islands); 90 Stat. 263 (§§ 402, 403) (Northern Mariana Islands).

[1]We note that Pub. L. 94–584, enacted in 1976 about a month before our grant of certiorari in this case, authorizes Guam to adopt a constitution for its own self-government but expressly provides that a provision of the territorial constitution establishing a system of local courts "shall become effective no sooner than upon the enactment of legislation regulating the relationship between the local courts of Guam with the Federal judicial system." § 2 (b) (7), 90 Stat. 2899. This suggests that Congress contemplates that Guam's judiciary should be treated like the judiciaries of other Territories whose judgments are subject to review by Art. III courts. The Guam Legislature has already enacted legislation to provide for a constitutional convention. Act of Dec. 10, 1976, Guam Pub. L. 13–202. Although this may eventually produce a judicial system complying with § 2 (b) (7) of Pub. L. 94–584 and subject to appellate review in Art. III courts, we perceive nothing in this prospect that should cause us to abstain from decision of the issues presented in this case.

decision is perhaps unprecedented in our history. The Court today abolishes the Supreme Court of Guam, a significant part of the system of self-government established by some 85,000 American citizens through their freely elected legislature.[1]

The Court's error, in my view, lies in its misinterpretation of the Organic Act of Guam. I do not doubt that Congress has the authority in the exercise of its plenary power over Territories of the United States, Art. IV, § 3, to reverse Guam's decision to reorganize its local court system. In this case, however, Congress has plainly authorized enactment of the challenged legislation, while there has been no corresponding delegation to this Court of the congressional power to veto such laws. Because "our judicial function" is limited "to apply[ing] statutes on the basis of what Congress has written, not what Congress might have written," *United States* v. *Great Northern R. Co.*, 343 U. S. 562, 575 (1952), I must respectfully dissent.

In reaching its decision, the Court focuses exclusively on the meaning of the second half of the second sentence of § 22 (a) of the Organic Act of Guam, 64 Stat. 389.[2] With all respect, this approach ignores the horse while concentrating on minute details of the cart's design. If the sentences of § 22

[1] See U. S. Dept. of Commerce, Statistical Abstract of the United States 855, 856 (1976); 8 U. S. C. § 1407; Guam Govt. Code § 2056 (1970).

[2] This statute, prior to a 1958 amendment, provided in pertinent part:

"There is hereby created a court of record to be designated the 'District Court of Guam', and the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as may have been or may hereafter be established by the laws of Guam. The District Court of Guam shall have, in all causes arising under the laws of the United States, the jurisdiction of a district court of the United States as such court is defined in section 451 of title 28, United States Code, and shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such appellate jurisdiction as the legislature may determine. The jurisdiction of and the procedure in the courts of Guam other than the District Court of Guam shall be prescribed by the laws of Guam."

(a) are simply read in the order in which they are written, their meaning is plain without resort to complex exegesis.

The first sentence creates the federal "District Court of Guam." It goes on to provide that "the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as may have been or may hereafter be established by the laws of Guam." This language is strikingly similar to the familiar words of Art. III, § 1: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Both provisions describe the bodies that will exercise the judicial power. They name one court and mandate its establishment. They leave the creation of the remainder of the court system to the legislature. But there is one key distinction: Where Art. III expressly describes the relationship among the courts, making one "supreme" and the others "inferior," § 22 (a) is silent.

The only reasonable conclusion that can be drawn from this distinction is that the Organic Act, unlike our Constitution, was intended to allow the elected representatives of the people governed by the courts to control the relationship among the courts. The absence of any indication of a superior-inferior structure in § 22 (a) also indicates that there is no reason to consider the federal and local courts other than coequal in matters as to which they share jurisdiction, *i. e.*, cases that might be appealed. Rather, the conspicuously incomplete emulation of the well-known Art. III model suggests that the people of Guam may terminate the District Court's appellate jurisdiction.

The Court ascribes great significance to the different language used to describe the legislature's power to "transfer" trial jurisdiction to the local courts, as contrasted with the power to "determine" appellate jurisdiction. The words, read in context, seem to me to be no more than alternative expressions for the same concept, used in the interest of avoiding

repetition. Thus, the first sentence of § 22 (a) gives Guam the authority to establish any courts it deems necessary. The last sentence of the section, also ignored in the Court's analysis, gives Guam the power to prescribe the "jurisdiction of and procedure in" such local courts. "Determine" as used in the context of the second sentence of § 22 (a) is an obvious synonym for "grant." If the Guam Legislature may grant the District Court appellate jurisdiction in the first instance, it has the converse power to withdraw it. Read as a whole, § 22 (a) plainly encompasses the power to give all appellate jurisdiction to a local court.

The Court relies on the fact that this interpretation of the Organic Act might insulate decisions of the local courts that involve questions of federal constitutional or statutory law from review in Art. III courts, something which other territorial charters have apparently not granted. With respect to the latter point, it is worth noting that Guam is a small and isolated possession that Congress might well have wished to give unusual autonomy in local affairs. No doubt, too, Congress' sense of the proper way to govern far-distant citizens has changed considerably in recent decades from the expansionist ethic which prevailed when Hawaii was annexed, the Spanish possessions (including Guam) ceded, and the Virgin Islands purchased. It is thus not surprising to find a broad authorization for self-government granted by the Organic Act passed in 1950. And it speaks well for the good sense of the people of Guam that they observed the functioning of the judicial system on their island for 23 years before deciding that a local appellate court would best serve their needs. This hiatus, therefore, does not indicate that Guam lacked the power to act, as the Court assumes, *ante*, at 201, but rather that the people deemed it unwise at that stage in their development to do so. Moreover, as careful analysis of the relevant sections of other territorial charters demonstrates, see *Agana Bay Dev. Co., Ltd.* v. *Supreme Court of Guam*, 529

F. 2d 952, 957–958 (CA9 1976), "the Guam Organic Act is unique and it delegates the widest powers of any of the territories to the legislature for the creation of appellate courts." *Id.*, at 957.

If there are constitutional problems with this interpretation of the Organic Act, see *ante*, at 201–202, 204, they do not arise from the action of the Guam Legislature in creating a local appellate court. Rather, they stem from the absence of a statute expressly providing for appeals from the Guam courts to an Art. III tribunal. As petitioner notes, Brief for Petitioner 15–19, Congress has in its dealings with Guam historically reacted to the developing legal needs of the island rather than anticipating them. See, *e. g.*, *Corn* v. *Guam Coral Co.*, 318 F. 2d 622, 624–627 (CA9 1963). This is not surprising; since the Organic Act did not set up a local court structure, it was impossible for Congress to foresee the manner in which the system as actually established would mesh with the Art. III courts. Most recently, Congress authorized Guam to design a local court system as part of the drafting of a new constitution, recognizing that it would thereafter be necessary to enact legislation "regulating the relationship between the local courts of Guam and the Federal judicial system." Pub. L. No. 94–584, 90 Stat. 2899, § 2 (b)(7).

In view of the willingness of Congress to accommodate both the aspirations of the people of Guam and the requirements of federal jurisdiction, I think there is no need to search for constitutional questions where none yet exist.[3] In the meantime, we should not eviscerate the court system carefully devised by the people of Guam in the exercise of their right of self-government.

I respectfully dissent.

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[3] Nowhere in respondent's presentation to this Court is there any claim of federal constitutional or statutory infirmities in his conviction for violation of the laws of Guam.

Syllabus

ABOOD ET AL. *v.* DETROIT BOARD OF EDUCATION ET AL.

APPEAL FROM THE COURT OF APPEALS OF MICHIGAN

No. 75–1153. Argued November 9, 1976—Decided May 23, 1977

A Michigan statute authorizing union representation of local governmental employees permits an "agency shop" arrangement, whereby every employee represented by a union, even though not a union member, must pay to the union, as a condition of employment, a service charge equal in amount to union dues. Appellant teachers filed actions (later consolidated) in Michigan state court against appellee Detroit Board of Education and appellee Union (which represented teachers employed by the Board) and Union officials, challenging the validity of the agency-shop clause in a collective-bargaining agreement between the Board and the Union. The complaints alleged that appellants were unwilling or had refused to pay Union dues, that they opposed collective bargaining in the public sector, that the Union was engaged in various political and other ideological activities that appellants did not approve and that were not collective-bargaining activities, and prayed that the agency-shop clause be declared invalid under state law and under the United States Constitution as a deprivation of appellants' freedom of association protected by the First and Fourteenth Amendments. The trial court dismissed the actions for failure to state a claim upon which relief could be granted. The Michigan Court of Appeals, while reversing and remanding on other grounds, upheld the constitutionality of the agency-shop clause, and, although recognizing that the expenditure of compulsory service charges to further "political purposes" unrelated to collective bargaining could violate appellants' First and Fourteenth Amendment rights, held that since the complaints had failed to allege that appellants had notified the Union as to those causes and candidates to which they objected, appellants were not entitled to restitution of any portion of the service charges. *Held:*

1. Insofar as the service charges are used to finance expenditures by the Union for collective-bargaining, contract-administration, and grievance-adjustment purposes, the agency-shop clause is valid. *Railway Employes' Dept.* v. *Hanson*, 351 U. S. 225; *Machinists* v. *Street*, 367 U. S. 740. Pp. 217–232.

(a) That government employment is involved, rather than private employment, does not mean that *Hanson, supra,* and *Street, supra,* can

be distinguished by relying in this case upon the doctrine that public employment cannot be conditioned upon the surrender of First Amendment rights, for the railroad employees' claim in *Hanson* that a union-shop agreement was invalid failed not because there was no governmental action but because there was no First Amendment violation. Pp. 226–227.

(b) Although public employee unions' activities are political to the extent they attempt to influence governmental policymaking, the differences in the nature of collective bargaining between the public and private sectors do not mean that a public employee has a weightier First Amendment interest than a private employee in not being compelled to contribute to the costs of exclusive union representation. A public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint, but, besides voting in accordance with his convictions, every public employee is largely free to express his views, in public or private, orally or in writing, and, with some exceptions not pertinent here, is free to participate in the full range of political and ideological activities open to other citizens. Pp. 227–232.

2. The principles that under the First Amendment an individual should be free to believe as he will and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State, prohibit appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher. Pp. 232–237.

(a) That appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. P. 234.

(b) The Constitution requires that a union's expenditures for ideological causes not germane to its duties as a collective-bargaining representative be financed from charges, dues, or assessments paid by employees who do not object to advancing such causes and who are not coerced into doing so against their will by the threat of loss of governmental employment. Pp. 234–235.

3. The Michigan Court of Appeals erred in holding that appellants were entitled to no relief even if they can prove their allegations and in depriving them of their right to such remedies as enjoining the Union from expending the service charges for ideological causes opposed by appellants, or ordering a refund of a portion of such charges, in the proportion such expenditures bear to the total Union expenditures. *Hanson, supra; Railway Clerks* v. *Allen*, 373 U. S. 113. In view,

however, of the fact that since the commencement of this litigation appellee Union has adopted an internal Union remedy for dissenters, it may be appropriate to defer further judicial proceedings pending the voluntary utilization by the parties of that internal remedy as a possible means of settling the dispute. Pp. 237–242.

60 Mich. App. 92, 230 N. W. 2d 322, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, REHNQUIST, and STEVENS, JJ., joined. REHNQUIST, J., *post*, p. 242, and STEVENS, J., *post*, p. 244, filed concurring opinions. POWELL, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and BLACKMUN, J., joined, *post*, p. 244.

Sylvester Petro argued the cause for appellants. With him on the briefs was *John L. Kilcullen*.

Theodore Sachs argued the cause and filed a brief for appellees.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The State of Michigan has enacted legislation authorizing a system for union representation of local governmental employees. A union and a local government employer are specifically permitted to agree to an "agency shop" arrangement, whereby every employee represented by a union—even though not a union member—must pay to the union, as a condition of employment, a service fee equal in amount to union dues. The issue before us is whether this arrangement violates the constitutional rights of government employees who object to public-sector unions as such or to various union activities financed by the compulsory service fees.

I

After a secret ballot election, the Detroit Federation of Teachers (Union) was certified in 1967 pursuant to Michigan

**Ronald A. Zumbrun* and *John H. Findley* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging reversal.

Robert H. Chanin and *David Rubin* filed a brief for the National Education Assn. as *amicus curiae* urging affirmance.

law as the exclusive representative of teachers employed by the Detroit Board of Education (Board).[1] The Union and the Board thereafter concluded a collective-bargaining agreement effective from July 1, 1969, to July 1, 1971. Among the agreement's provisions was an "agency shop" clause, requiring every teacher who had not become a Union member within 60 days of hire (or within 60 days of January 26, 1970, the effective date of the clause) to pay the Union a service charge equal to the regular dues required of Union members. A teacher who failed to meet this obligation was subject to discharge. Nothing in the agreement, however, required any teacher to join the Union, espouse the cause of unionism, or participate in any other way in Union affairs.

On November 7, 1969—more than two months before the agency-shop clause was to become effective—Christine Warczak and a number of other named teachers filed a class action in a state court, naming as defendants the Board, the Union, and several Union officials. Their complaint, as amended, alleged that they were unwilling or had refused to pay dues[2] and that they opposed collective bargaining in

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[1] The certification was authorized by Mich. Comp. Laws § 423.211 (1970), which provides:

"Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer: Provided, That any individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment."

[2] Some of the plaintiffs were Union members and were paying agency-shop fees under protest; others had refused either to pay or to join the Union; still others had joined the Union and paid the fees without any

the public sector. The amended complaint further alleged that the Union "carries on various social activities for the benefit of its members which are not available to non-members as a matter of right," and that the Union is engaged

> "in a number and variety of activities and programs which are economic, political, professional, scientific and religious in nature of which Plaintiffs do not approve, and in which they will have no voice, and which are not and will not be collective bargaining activities, i. e., the negotiation and administration of contracts with Defendant Board, and that a substantial part of the sums required to be paid under said Agency Shop Clause are used and will continue to be used for the support of such activities and programs, and not solely for the purpose of defraying the cost of Defendant Federation of its activities as bargaining agent for teachers employed by Defendant Board." [3]

The complaint prayed that the agency-shop clause be declared invalid under state law and also under the United States Constitution as a deprivation of, *inter alia*, the plaintiffs' freedom of association protected by the First and Fourteenth Amendments, and for such further relief as might be deemed appropriate.

Upon the defendants' motion for summary judgment, the trial court dismissed the action for failure to state a claim upon which relief could be granted.[4] *Warczak* v. *Board of*

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apparent protest. The agency-shop clause itself prohibits the discharge of an employee engaged in litigation concerning his service charge obligation until his legal remedies have been exhausted, and no effort to enforce the clause against any of the plaintiffs has been made.

[3] The nature of these activities and of the objections to them were not described in any further detail.

[4] A grant of summary judgment under Mich. Gen. Ct. Rule 117.2 (1) is equivalent to dismissal under Fed. Rule Civ. Proc. 12 (b) (6) for failure

Education, 73 LRRM 2237 (Cir. Ct. Wayne County). The plaintiffs appealed, and while their appeal was pending the Michigan Supreme Court ruled in *Smigel* v. *Southgate Community School Dist.*, 388 Mich. 531, 202 N. W. 2d 305, that state law prohibited an agency shop in the public sector. Accordingly, the judgment in the *Warczak* case was vacated and remanded to the trial court for further proceedings consistent with the *Smigel* decision.

Meanwhile, D. Louis Abood and other named teachers had filed a separate action in the same state trial court. The allegations in the complaint were virtually identical to those in *Warczak*,[5] and similar relief was requested.[6] This second action was held in abeyance pending disposition of the *Warczak* appeal, and when that case was remanded the two cases were consolidated in the trial court for consideration of the defendants' renewed motion for summary judgment.

On November 5, 1973, that motion was granted. The trial court noted that following the *Smigel* decision, the Michigan Legislature had in 1973 amended its Public Employment Relations Act so as expressly to authorize an agency shop. 1973 Mich. Pub. Acts, No. 25, codified as Mich. Comp. Laws § 423.210 (1)(c).[7] This amendment was applied retro-

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to state a claim upon which relief can be granted. See *Bielski* v. *Wolverine Ins. Co.*, 379 Mich. 280, 150 N. W. 2d 788; *Hiers* v. *Brownell*, 376 Mich. 225, 136 N. W. 2d 10; *Handwerk* v. *United Steelworkers of America*, 67 Mich. App. 747, 242 N. W. 2d 514; *Crowther* v. *Ross Chem. & Mfg. Co.*, 42 Mich. App. 426, 202 N. W. 2d 577.

[5] The only material difference was that *Abood* was not a class action.

[6] The *Abood* complaint prayed for declaratory and injunctive relief against discharge of any teacher for failure to pay the service charge, and for such other relief as might be deemed appropriate.

[7] That section provides in relevant part:

"[N]othing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 to require as a condition of employment that all employees in the bargaining unit pay to the

actively by the trial court to validate the agency-shop clause predating 1973 as a matter of state law, and the court ruled further that such a clause does not violate the Federal Constitution.

The plaintiffs' appeals were consolidated by the Michigan Court of Appeals, which ruled that the trial court had erred in giving retroactive application to the 1973 legislative amendment. The appellate court proceeded, however, to consider the constitutionality of the agency-shop clause, and upheld its facial validity on the authority of this Court's decision in *Railway Employes' Dept.* v. *Hanson*, 351 U. S. 225, which upheld the constitutionality under the First Amendment of a union-shop clause, authorized by the Railway Labor Act, requiring financial support of the exclusive bargaining representative by every member of the bargaining unit. *Id.*, at 238. Noting, however, that Michigan law also permits union expenditures for legislative lobbying and in support of political candidates, the state appellate court identified an issue explicitly not considered in *Hanson*—the constitutionality of using compulsory service charges to further "political purposes" unrelated to collective bargaining. Although recognizing that such expenditures "could violate plaintiffs' First and Fourteenth Amendment rights," the court read this Court's more recent decisions to require that an employee who seeks to vindicate such rights must "make known to the union those causes and candidates to which he objects." Since the complaints had failed to allege that any such notification had been given, the court held that the plaintiffs were not entitled to restitution of any portion of the service charges. The trial court's error on the retroactivity question, however, led the appellate court to reverse and remand

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exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative . . . ."

the case.[8] 60 Mich. App. 92, 230 N. W. 2d 322. After the Supreme Court of Michigan denied review, the plaintiffs appealed to this Court, 28 U. S. C. § 1257 (2), and we noted probable jurisdiction, 425 U. S. 949.[9]

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[8] The purpose of the remand was not expressly indicated. The trial court had entered judgment for the defendants upon the ground that the complaint failed to state a claim on which relief could be granted. The state appellate court's ruling that the 1973 amendment was not to be given retroactive effect did not undermine the validity of the trial court's judgment, for the Court of Appeals' determination that any possibly meritorious claims raised by the plaintiffs were prematurely asserted required the same result as that ordered by the trial court. The remand "as to the retroactive application given to [the 1973 amendment]" must, therefore, have been only for a ministerial purpose, such as the correction of language in the trial court's judgment for the defendants. In these circumstances, the judgment of the Court of Appeals is final for purposes of 28 U. S. C. § 1257 (2). See, *e. g.*, *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379, 382; *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 67–68; *Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U. S. 69, 72–74.

[9] At oral argument the suggestion was made that this case might be moot. The only agency-shop clause placed in issue by the complaints was contained in a collective-bargaining agreement that expired in 1971. That clause was unenforceable as a matter of state law after the decision in *Smigel* and the ruling of the State Court of Appeals in the present cases that the 1973 statute should not be given retroactive application.

But both sides acknowledged in their briefs submitted to the Michigan Court of Appeals that a successor collective-bargaining agreement effective in 1973 contained substantially the identical agency-shop provision. The Court of Appeals appears to have taken judicial notice of this agreement in rendering its decision, for otherwise its ruling that the 1973 amendment was not retroactive would have disposed of the case without the need to consider any constitutional questions. Since the state appellate court considered the 1973 agreement to be part of the record in making its ruling, we proceed upon the same premise.

The fact that the 1973 agreement may have expired since the state appellate court rendered its decision does not affect the continuing vitality of this controversy for Art. III purposes. Some of the plaintiffs in both *Warczak* and *Abood* either refused to pay the service charge or paid it under protest. See n. 2, *supra*. Their contention that they cannot

II

A

Consideration of the question whether an agency-shop provision in a collective-bargaining agreement covering governmental employees is, as such, constitutionally valid must begin with two cases in this Court that on their face go far toward resolving the issue. The cases are *Railway Employes' Dept.* v. *Hanson, supra,* and *Machinists* v. *Street,* 367 U. S. 740.

In the *Hanson* case a group of railroad employees brought an action in a Nebraska court to enjoin enforcement of a union-shop agreement.[10] The challenged clause was author-

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constitutionally be compelled to contribute the service charge, or at least some portion of it, thus survives the expiration of the collective-bargaining agreement itself.

[10] Under a union-shop agreement, an employee must become a member of the union within a specified period of time after hire, and must as a member pay whatever union dues and fees are uniformly required. Under both the National Labor Relations Act and the Railway Labor Act, "[i]t is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues." *NLRB* v. *General Motors,* 373 U. S. 734, 742. See 29 U. S. C. § 158 (a) (3); 45 U. S. C. § 152 Eleventh, quoted in n. 11, *infra.* Hence, although a union shop denies an employee the option of not formally becoming a union member, under federal law it is the "practical equivalent" of an agency shop, *NLRB* v. *General Motors, supra,* at 743. See also *Lathrop* v. *Donohue,* 367 U. S. 820, 828.

Hanson was concerned simply with the requirement of financial support for the union, and did not focus on the question whether the additional requirement of a union-shop arrangement that each employee formally join the union is constitutionally permissible. See *NLRB* v. *General Motors, supra,* at 744 ("Such a difference between the union and agency shop may be of great importance in some contexts . . ."); cf. *Storer* v. *Brown,* 415 U. S. 724, 745–746. As the agency shop before us does not impose that additional requirement, we have no occasion to address that question.

ized, and indeed shielded from any attempt by a State to prohibit it, by the Railway Labor Act, 45 U. S. C. § 152 Eleventh.[11] The trial court granted the relief requested. The Nebraska Supreme Court upheld the injunction on the ground that employees who disagreed with the objectives promoted by union expenditures were deprived of the freedom of association protected by the First Amendment. This Court agreed that "justiciable questions under the First and Fifth Amendments were presented," 351 U. S., at 231,[12]

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[11] In relevant part, that section provides:

"Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership."

[12] Unlike § 14 (b) of the National Labor Relations Act, 29 U. S. C. § 164 (b), the Railway Labor Act pre-empts any attempt by a State to prohibit a union-shop agreement. Had it not been for that federal statute, the union-shop provision at issue in *Hanson* would have been invalidated under Nebraska law. The *Hanson* Court accordingly reasoned that government action was present: "[T]he federal statute is the source of the power and authority by which any private rights are lost or sacrificed. . . . The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates . . . ." 351 U. S., at 232. See also *id.*, at 232 n. 4 ("Once courts enforce the agreement the sanction of government is, of course, put behind

but reversed the judgment of the Nebraska Supreme Court on the merits. Acknowledging that "[m]uch might be said *pro* and *con*" about the union shop as a policy matter, the Court noted that it is Congress that is charged with identifying "[t]he ingredients of industrial peace and stabilized labor-management relations . . . ." *Id.*, at 233–234. Congress determined that it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its cost, and that legislative judgment was surely an allowable one. *Id.*, at 235.

The record in *Hanson* contained no evidence that union dues were used to force ideological conformity or otherwise to impair the free expression of employees, and the Court noted that "[i]f 'assessments' are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented." *Ibid.* (footnote omitted). But the Court squarely held that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate . . . the First . . . Amendmen[t]." *Id.*, at 238.

The Court faced a similar question several years later in the *Street* case, which also involved a challenge to the constitutionality of a union shop authorized by the Railway Labor Act. In *Street*, however, the record contained findings that the union treasury to which all employees were required to contribute had been used "to finance the campaigns of candidates for federal and state offices whom [the plaintiffs] opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed." 367 U. S., at 744.

The Court recognized, *id.*, at 749, that these findings presented constitutional "questions of the utmost gravity" not

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them. See *Shelley* v. *Kraemer*, 334 U. S. 1; *Hurd* v. *Hodge*, 334 U. S. 24; *Barrows* v. *Jackson*, 346 U. S. 249").

decided in *Hanson*, and therefore considered whether the Act could fairly be construed to avoid these constitutional issues. 367 U. S., at 749–750.[13] The Court concluded that the Act could be so construed, since only expenditures related to the union's functions in negotiating and administering the collective-bargaining agreement and adjusting grievances and disputes fell within "the reasons . . . accepted by Congress why authority to make union-shop agreements was justified," *id.*, at 768. The Court ruled, therefore, that the use of compulsory union dues for political purposes violated the Act itself. Nonetheless, it found that an injunction against enforcement of the union-shop agreement as such was impermissible under *Hanson*, and remanded the case to the Supreme Court of Georgia so that a more limited remedy could be devised.

The holding in *Hanson*, as elaborated in *Street*, reflects familiar doctrines in the federal labor laws. The principle of exclusive union representation, which underlies the National Labor Relations Act[14] as well as the Railway Labor Act, is a central element in the congressional structuring of industrial relations. *E. g., Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U. S. 50, 62–63; *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 180; *Medo Corp.* v. *NLRB*, 321 U. S. 678, 684–685; *Virginian R. Co.* v. *System Federation No. 40*, 300 U. S. 515, 545–549. The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating

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[13] In suggesting that *Street* "significantly undercut," and constituted a "rethinking" of, *Hanson*, *post*, at 247, the opinion concurring in the judgment loses sight of the fact that the record in *Street*, unlike that in *Hanson*, potentially presented constitutional questions arising from union expenditures for ideological purposes unrelated to collective bargaining.

[14] 29 U. S. C. § 151 *et seq.*

dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations. See generally *Emporium Capwell Co.* v. *Western Addition Community Org., supra,* at 67–70; S. Rep. No. 573, 74th Cong., 1st Sess., 13 (1935).

The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. See *Street,* 367 U. S., at 760. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged "fairly and equitably to represent all employees . . . , union and nonunion," within the relevant unit. *Id.,* at 761.[15] A union-

[15] See *Hines* v. *Anchor Motor Freight, Inc.,* 424 U. S. 554, 564:

"Because '[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit,' *Vaca* v. *Sipes,* 386 U. S. 171, 182 (1967), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, 'the responsibility and duty of fair representation.' *Humphrey* v. *Moore, supra,* at 342. The union as the statutory representative of the employees is 'subject always to complete good faith and honesty of purpose in the exercise of its discretion.' *Ford Motor Co.* v. *Huffman,* [345 U. S. 330, 338]. Since *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192 (1944), with respect to the railroad industry, and *Ford Motor Co.* v. *Huffman, supra,* and *Syres* v. *Oil Workers,* 350 U. S. 892 (1955), with respect to those industries reached by the National Labor Relations Act, the duty of fair representation has served as a 'bulwark to prevent arbitrary union

shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders"—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees. *Ibid.*; see *Oil Workers* v. *Mobil Oil Corp.*, 426 U. S. 407, 415–416; *NLRB* v. *General Motors*, 373 U. S. 734, 740–741.

To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit.[16] But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. "The

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conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.' *Vaca* v. *Sipes*, *supra*, at 182."

[16] See *infra*, at 233–235.

furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy. If that were allowed, we would be reversing the *Hanson* case, *sub silentio*." *Machinists* v. *Street*, 367 U. S., at 778 (Douglas, J., concurring).

B

The National Labor Relations Act leaves regulation of the labor relations of state and local governments to the States. See 29 U. S. C. § 152 (2). Michigan has chosen to establish for local government units a regulatory scheme which, although not identical in every respect to the NLRA or the Railway Labor Act,[17] is broadly modeled after federal law. *E. g.*, *Rockwell* v. *Crestwood School Dist. Bd. of Ed.*, 393 Mich. 616, 635–636, 227 N. W. 2d 736, 744–745, appeal dismissed *sub nom. Crestwood Ed. Assn.* v. *Board of Ed. of Crestwood*, 427 U. S. 901; *Detroit Police Officers Assn.* v. *Detroit*, 391 Mich. 44, 53, 214 N. W. 2d 803, 807–808; *Michigan Employment Relations Comm'n* v. *Reeths-Puffer School Dist.*, 391 Mich. 253, 260, and n. 11, 215 N. W. 2d 672, 675, and n. 11. Under Michigan law employees of local government units enjoy rights parallel to those protected under federal legislation: the rights to self-organization and to bargain collectively, Mich. Comp. Laws §§ 423.209, 423.215 (1970); see 29 U. S. C. § 157; 45 U. S. C. § 152 Fourth; and the right to secret-ballot representation elections, Mich. Comp. Laws § 423.212 (1970); see 29 U. S. C. § 159 (e)(1); 45 U. S. C. § 152 Ninth.

Several aspects of Michigan law that mirror provisions of the Railway Labor Act are of particular importance here. A union that obtains the support of a majority of employees

[17] See, *e. g.*, *infra*, at 229.

in the appropriate bargaining unit is designated the exclusive representative of those employees. Mich. Comp. Laws § 423.211 (1970).[18] A union so designated is under a duty of fair representation to all employees in the unit, whether or not union members. *E. g., Lowe* v. *Hotel & Restaurant Employees Local 705*, 389 Mich. 123, 145–152, 205 N. W. 2d 167, 177–180; *Wayne County Community College Federation of Teachers Local 2000* v. *Poe*, 1976 Mich. Emp. Rel. Comm'n 347, 350–353; *Local 836, AFSCME* v. *Solomon*, 1976 Mich. Emp. Rel. Comm'n 84, 89. And in carrying out all of its various responsibilities, a recognized union may seek to have an agency-shop clause included in a collective-bargaining agreement. Mich. Comp. Laws § 423.210 (1)(c) (1970). Indeed, the 1973 amendment to the Michigan law[19] was specifically designed to authorize agency shops in order that "employees in the bargaining unit . . . share fairly in the financial support of their exclusive bargaining representative . . . ." § 423.210 (2).

The governmental interests advanced by the agency-shop provision in the Michigan statute are much the same as those promoted by similar provisions in federal labor law. The confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement, are no different in kind from the evils that the exclusivity rule in the Railway Labor Act was designed to avoid. See *Madison School Dist.* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167, 178 (BRENNAN, J., concurring in judgment). The desirability of labor peace is no less important in the public sector, nor is the risk of "free riders" any smaller.

Our province is not to judge the wisdom of Michigan's

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[18] See n. 1, *supra*.

[19] See *supra*, at 214, and n. 7.

decision to authorize the agency shop in public employment.[20] Rather, it is to adjudicate the constitutionality of that decision. The same important government interests recognized in the *Hanson* and *Street* cases presumptively support the impingement upon associational freedom created by the agency shop here at issue. Thus, insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance

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[20] See *Hanson*, 351 U. S., at 233–234 (footnote omitted):

"Powerful arguments have been made here that the long-run interests of labor would be better served by the development of democratic traditions in trade unionism without the coercive element of the union or the closed shop. Mr. Justice Brandeis, who had wide experience in labor-mangement relations prior to his appointment to the Court, wrote forcefully against the closed shop. He feared that the closed shop would swing the pendulum in the opposite extreme and substitute 'tyranny of the employee' for 'tyranny of the employer.' But the question is one of policy with which the judiciary has no concern, as Mr. Justice Brandeis would have been the first to concede. Congress, acting within its constitutional powers, has the final say on policy issues. If it acts unwisely, the electorate can make a change. The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises. The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary."

See also *Adair* v. *United States*, 208 U. S. 161, 191–192 (Holmes, J., dissenting):

"I quite agree that the question what and how much good labor unions do, is one on which intelligent people may differ,—I think that laboring men sometimes attribute to them advantages, as many attribute to combinations of capital disadvantages, that really are due to economic conditions of a far wider and deeper kind—but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large."

adjustment, those two decisions of this Court appear to require validation of the agency-shop agreement before us.

While recognizing the apparent precedential weight of the *Hanson* and *Street* cases, the appellants advance two reasons why those decisions should not control decision of the present case. First, the appellants note that it is *government employment* that is involved here, thus directly implicating constitutional guarantees, in contrast to the private employment that was the subject of the *Hanson* and *Street* decisions. Second, the appellants say that in the public sector collective bargaining itself is inherently "political," and that to require them to give financial support to it is to require the "ideological conformity" that the Court expressly found absent in the *Hanson* case. 351 U. S., at 238. We find neither argument persuasive.

Because it is employment by the State that is here involved, the appellants suggest that this case is governed by a long line of decisions holding that public employment cannot be conditioned upon the surrender of First Amendment rights.[21] But, while the actions of public employers surely constitute "state action," the union shop, as authorized by the Railway Labor Act, also was found to result from governmental action in *Hanson*.[22] The plaintiffs' claims in *Hanson* failed, not because there was no governmental action, but because there was no First Amendment violation.[23] The

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[21] See, *e. g.*, cases cited, *infra*, at 233–235.

[22] See *supra*, at 218, and n. 12.

[23] Nothing in our opinion embraces the "premise that public employers are under no greater constitutional constraints than their counterparts in the private sector," *post*, at 245 (POWELL, J., concurring in judgment), or indicates that private collective-bargaining agreements are, without more, subject to constitutional constraints, see *post*, at 252. We compare the agency-shop agreement in this case to those executed under the Railway Labor Act simply because the existence of governmental action in both contexts requires analysis of the free expression question.

It is somewhat startling, particularly in view of the concession that

appellants' reliance on the "unconstitutional conditions" doctrine is therefore misplaced.

The appellants' second argument is that in any event collective bargaining in the public sector is inherently "political" and thus requires a different result under the First and Fourteenth Amendments. This contention rests upon the important and often-noted differences in the nature of collective bargaining in the public and private sectors.[24] A public employer, unlike his private counterpart, is not guided by the profit motive and constrained by the normal operation of the market. Municipal services are typically not priced, and

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Hanson was premised on a finding that governmental action was present, see *post*, at 246 (POWELL, J., concurring in judgment), to read in MR. JUSTICE POWELL'S concurring opinion that *Hanson* and *Street* "provide little or no guidance for the constitutional issues presented in this case," *post*, at 254. *Hanson* nowhere suggested that the constitutional scrutiny of the agency-shop agreement was watered down because the governmental action operated less directly than is true in a case such as the present one. Indeed, Mr. Justice Douglas, the author of *Hanson*, expressly repudiated that suggestion:

"Since neither Congress nor the state legislatures can abridge [First Amendment] rights, they cannot grant the power to private groups to abridge them. As I read the First Amendment, it forbids any abridgment by government whether directly or indirectly." *Street*, 367 U. S., at 777 (concurring opinion).

[24] See, *e. g.*, K. Hanslowe, The Emerging Law of Labor Relations in Public Employment (1967); H. Wellington & R. Winter, Jr., The Unions and the Cities (1971); Hildebrand, The Public Sector, in J. Dunlop and N. Chamberlain (eds.), Frontiers of Collective Bargaining 125–154 (1967); Rehmus, Constraints on Local Governments in Public Employee Bargaining, 67 Mich. L. Rev. 919 (1969); Shaw & Clark, The Practical Differences Between Public and Private Sector Collective Bargaining, 19 U. C. L. A. L. Rev. 867 (1972); Smith, State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis, 67 Mich. L. Rev. 891 (1969); Summers, Public Employee Bargaining: A Political Perspective, 83 Yale L. J. 1156 (1974); Project, Collective Bargaining and Politics in Public Employment, 19 U. C. L. A. L. Rev. 887 (1972). The general description in the text of the differences between private- and public-sector collective bargaining is drawn from these sources.

where they are they tend to be regarded as in some sense "essential" and therefore are often price-inelastic. Although a public employer, like a private one, will wish to keep costs down, he lacks an important discipline against agreeing to increases in labor costs that in a market system would require price increases. A public-sector union is correspondingly less concerned that high prices due to costly wage demands will decrease output and hence employment.

The government officials making decisions as the public "employer" are less likely to act as a cohesive unit than are managers in private industry, in part because different levels of public authority—department managers, budgetary officials, and legislative bodies—are involved, and in part because each official may respond to a distinctive political constituency. And the ease of negotiating a final agreement with the union may be severely limited by statutory restrictions, by the need for the approval of a higher executive authority or a legislative body, or by the commitment of budgetary decisions of critical importance to others.

Finally, decisionmaking by a public employer is above all a political process. The officials who represent the public employer are ultimately responsible to the electorate, which for this purpose can be viewed as comprising three overlapping classes of voters—taxpayers, users of particular government services, and government employees. Through exercise of their political influence as part of the electorate, the employees have the opportunity to affect the decisions of government representatives who sit on the other side of the bargaining table. Whether these representatives accede to a union's demands will depend upon a blend of political ingredients, including community sentiment about unionism generally and the involved union in particular, the degree of taxpayer resistance, and the views of voters as to the importance of the service involved and the relation between the demands and the quality of service. It is surely arguable,

however, that permitting public employees to unionize and a union to bargain as their exclusive representative gives the employees more influence in the decisionmaking process than is possessed by employees similarly organized in the private sector.

The distinctive nature of public-sector bargaining has led to widespread discussion about the extent to which the law governing labor relations in the private sector provides an appropriate model. To take but one example, there has been considerable debate about the desirability of prohibiting public employee unions from striking,[25] a step that the State of Michigan itself has taken, Mich. Comp. Laws § 423.202 (1970). But although Michigan has not adopted the federal model of labor relations in every respect, it has determined that labor stability will be served by a system of exclusive representation and the permissive use of an agency shop in public employment. As already stated, there can be no principled basis for according that decision less weight in the constitutional balance than was given in *Hanson* to the congressional judgment reflected in the Railway Labor Act.[26] The only remaining constitutional inquiry evoked by the appellants' argument, therefore, is whether a public employee has a weightier First Amendment interest than a private employee in not being compelled to contribute to the costs of exclusive union representation. We think he does not.

Public employees are not basically different from private employees; on the whole, they have the same sort of skills, the

[25] See, *e. g.*, Anderson, Strikes and Impasse Resolution in Public Employment, 67 Mich. L. Rev. 943 (1969); Burton & Krider, The Role and Consequences of Strikes by Public Employees, 79 Yale L. J. 418 (1970); Hildebrand, *supra*, n. 24; Kheel, Strikes and Public Employment, 67 Mich. L. Rev. 931 (1969); Wellington & Winter, The Limits of Collective Bargaining in Public Employment, 78 Yale L. J. 1107 (1969); Wellington & Winter, More on Strikes by Public Employees, 79 Yale L. J. 441 (1970).

[26] See n. 20, *supra*.

same needs, and seek the same advantages. "The uniqueness of public employment is *not in the employees* nor in the work performed; the uniqueness is in the special character of the employer." Summers, Public Sector Bargaining: Problems of Governmental Decisionmaking, 44 U. Cin. L. Rev. 669, 670 (1975) (emphasis added). The very real differences between exclusive-agent collective bargaining in the public and private sectors are not such as to work any greater infringement upon the First Amendment interests of public employees. A public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint. Besides voting in accordance with his convictions, every public employee is largely free to express his views, in public or private, orally or in writing. With some exceptions not pertinent here,[27] public employees are free to participate in the full range of political activities open to other citizens. Indeed, just this Term we have held that the First and Fourteenth Amendments protect the right of a public school teacher to oppose, at a public school board meeting, a position advanced by the teachers' union. *Madison School Dist.* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167. In so ruling we recognized that the principle of exclusivity cannot constitutionally be used to muzzle a public employee who, like any other citizen, might wish to express his view about governmental decisions concerning labor relations, *id.*, at 174.

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[27] Employees of state and local governments may be subject to a "little Hatch Act" designed to ensure that government operates effectively and fairly, that public confidence in government is not undermined, and that government employees do not become a powerful political machine controlled by incumbent officials. See, *e. g.*, *Broadrick* v. *Oklahoma*, 413 U. S. 601, 603–604; *CSC* v. *Letter Carriers*, 413 U. S. 548, 554–567. Moreover, there may be limits on the extent to which an employee in a sensitive or policymaking position may freely criticize his superiors and the policies they espouse. See *Pickering* v. *Board of Education*, 391 U. S. 563, 570 n. 3.

There can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities—and the views of members who disagree with them—may be properly termed political. But that characterization does not raise the ideas and beliefs of public employees onto a higher plane than the ideas and beliefs of private employees. It is no doubt true that a central purpose of the First Amendment " 'was to protect the free discussion of governmental affairs.' " *Post*, at 259, quoting *Buckley* v. *Valeo*, 424 U. S. 1, 14, and *Mills* v. *Alabama*, 384 U. S. 214, 218. But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection.[28] Union members in both the public and private sectors may find that a variety of union activities conflict with their beliefs. Compare, *e. g.*,

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[28] See, *e. g.*, *Wooley* v. *Maynard*, 430 U. S. 705, 714 (the First Amendment "secures the right to proselytize religious, political, *and ideological* causes") (emphasis supplied); *Young* v. *American Mini Theatres*, 427 U. S. 50, 70 (plurality opinion) (protection of the First Amendment is fully applicable to the communication of social, political, or philosophical messages); *id.*, at 87 (dissenting opinion) (even offensive speech that does not address "important topics" is not less worthy of constitutional protection); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95–96; *Cohen* v. *California*, 403 U. S. 15, 25, quoting *Winters* v. *New York*, 333 U. S. 507, 528 (Frankfurter, J., dissenting); *Street* v. *New York*, 394 U. S. 576, 593, quoting *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 641–642 (" '[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, *or other matters of opinion*' ") (emphasis supplied); *NAACP* v. *Button*, 371 U. S. 415, 444–445; *Kingsley Pictures Corp.* v. *Regents*, 360 U. S. 684, 688 (suppression of a motion picture because it expresses the idea that under certain circumstances adultery may be proper behavior strikes at the very heart of First Amendment protection); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 460 ("it is immaterial whether the beliefs sought to be advanced . . . pertain to political, economic, religious, or cultural matters"); *Roth* v. *United States*, 354 U. S. 476, 488, quoting *Thornhill* v. *Alabama*, 310 U. S. 88, 101–102.

supra, at 222, with *post*, at 256–257. Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective "political" can properly be attached to those beliefs the critical constitutional inquiry.

The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights. Even those commentators most acutely aware of the distinctive nature of public-sector bargaining and most seriously concerned with its policy implications agree that "[t]he union security issue in the public sector . . . is fundamentally the same issue . . . as in the private sector. . . . No special dimension results from the fact that a union represents public rather than private employees." H. Wellington & R. Winter, Jr., The Unions and the Cities 95–96 (1971). We conclude that the Michigan Court of Appeals was correct in viewing this Court's decisions in *Hanson* and *Street* as controlling in the present case insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes.

C

Because the Michigan Court of Appeals ruled that state law "sanctions the use of nonunion members' fees for purposes other than collective bargaining," 60 Mich. App., at 99, 230 N. W. 2d, at 326, and because the complaints allege that such expenditures were made, this case presents constitutional issues not decided in *Hanson* or *Street*. Indeed *Street* embraced an interpretation of the Railway Labor Act not without its difficulties, see 367 U. S., at 784–786 (Black, J., dissenting); *id.*, at 799–803 (Frankfurter, J., dissenting), precisely to avoid facing the constitutional issues presented by the use of union-shop dues for political and ideological purposes unrelated to collective bargaining, *id.*, at 749–750. Since the state court's construction of the Michigan statute

is authoritative, however, we must confront those issues in this case.[29]

Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. *E. g., Elrod* v. *Burns,* 427 U. S. 347, 355–357 (plurality opinion); *Cousins* v. *Wigoda,* 419 U. S. 477, 487; *Kusper* v. *Pontikes,* 414 U. S. 51, 56–57; *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 460–461.

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[29] In *Lathrop* v. *Donohue,* 367 U. S. 820, a companion case to *Street,* a lawyer sued for the refund of dues paid (under protest) to the integrated Wisconsin State Bar. The dues were required as a condition of practicing law in Wisconsin. The plaintiff contended that the requirement violated his constitutionally protected freedom of association because the dues were used by the State Bar to formulate and to support legislative proposals concerning the legal profession to which the plaintiff objected.

A plurality of four Justices found that the requirement was not on its face unconstitutional, relying on the analogy to *Hanson.* And the plurality ruled, as had the Court in *Hanson,* that the constitutional questions tendered were not ripe, for the Court was nowhere "clearly apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position, or as to the way in which and the degree to which funds compulsorily exacted from its members are used to support the organization's political activities." 367 U. S., at 845–846. The other five Members of the Court disagreed with the plurality and thought that the constitutional questions ought to be reached. Three Justices would have upheld the constitutionality of using compulsory dues to finance the State Bar's legislative activities even where opposed by dissenting members. See *id.,* at 848 (Harlan, J., concurring in judgment); *id.,* at 865 (Whittaker, J., concurring in result). The other two Justices would have held such activities to be unconstitutional. See *ibid.* (Black, J., dissenting); *id.,* at 877 (Douglas, J., dissenting).

The only proposition about which a majority of the Court in *Lathrop* agreed was that the constitutional issues should be reached. However, due to the disparate views of those five Justices on the merits and the failure of the other four Members of the Court to discuss the constitutional questions, *Lathrop* does not provide a clear holding to guide us in adjudicating the constitutional questions here presented.

Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment. *E. g., Elrod* v. *Burns, supra,* at 357–360, and cases cited; *Perry* v. *Sindermann,* 408 U. S. 593; *Keyishian* v. *Board of Regents,* 385 U. S. 589. The appellants argue that they fall within the protection of these cases because they have been prohibited, not from actively associating, but rather from refusing to associate. They specifically argue that they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative. We have concluded that this argument is a meritorious one.

One of the principles underlying the Court's decision in *Buckley* v. *Valeo,* 424 U. S. 1, was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because "[m]aking a contribution . . . enables like-minded persons to pool their resources in furtherance of common political goals," *id.,* at 22, the Court reasoned that limitations upon the freedom to contribute "implicate fundamental First Amendment interests," *id.,* at 23.[30]

The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights.[31] For at the heart of the First Amendment is the

[30] See also *Shelton* v. *Tucker,* 364 U. S. 479 (state statute which required every teacher to file annually an affidavit listing every organization to which he had belonged *or regularly contributed* is unconstitutional because of its unlimited and indiscriminate interference with freedom of association).

[31] This view has long been held. James Madison, the First Amendment's author, wrote in defense of religious liberty: "Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may

notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. See *Elrod* v. *Burns, supra,* at 356–357; *Stanley* v. *Georgia,* 394 U. S. 557, 565; *Cantwell* v. *Connecticut,* 310 U. S. 296, 303–304. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed.* v. *Barnette,* 319 U. S. 624, 642.

These principles prohibit a State from compelling any individual to affirm his belief in God, *Torcaso* v. *Watkins,* 367 U. S. 488, or to associate with a political party, *Elrod* v. *Burns, supra;* see 427 U. S., at 363–364, n. 17, as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher.

We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative.[32] Rather, the Constitution requires only that

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force him to conform to any other establishment in all cases whatsoever?" 2 The Writings of James Madison 186 (Hunt ed. 1901). Thomas Jefferson agreed that " 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.' " I. Brant, James Madison: The Nationalist 354 (1948).

[32] To the extent that this activity involves support of political candidates, it must, of course, be conducted consistently with any applicable (and constitutional) system of election campaign regulation. See gen-

such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited.[33] The Court held in *Street*, as a matter of statutory construction, that a similar line must be drawn under the Railway Labor Act, but in the public sector the line may be somewhat hazier. The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process. We have no occasion in this case, however, to try to define such a dividing line. The case comes to us after a judgment on the pleadings, and there is no evidentiary record of any kind. The allegations in the complaints are general ones, see *supra*, at 212–213, and the parties have neither briefed nor argued the question of what specific Union activities in the present context properly fall under the definition of collective bargaining. The lack of factual concreteness and adversary presentation to aid us in approaching the difficult line-drawing questions highlights the

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erally *Buckley* v. *Valeo*, 424 U. S. 1; Developments in the Law—Elections, 88 Harv. L. Rev. 1111, 1237–1271 (1975).

[33] The appellants' complaints also alleged that the Union carries on various "social activities" which are not open to nonmembers. It is unclear to what extent such activities fall outside the Union's duties as exclusive representative or involve constitutionally protected rights of association. Without greater specificity in the description of such activities and the benefit of adversary argument, we leave those questions in the first instance to the Michigan courts.

importance of avoiding unnecessary decision of constitutional questions.[34] All that we decide is that the general allegations in the complaints, if proved, establish a cause of action under the First and Fourteenth Amendments.

III

In determining what remedy will be appropriate if the appellants prove their allegations, the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.[35] This task is simplified by the guidance to be had from prior decisions. In *Street*, the plaintiffs had proved at trial that expenditures were being made for political purposes of various kinds, and

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[34] A further reason to avoid anticipating difficult constitutional questions in this case is the possibility that the dispute may be settled by resort to a newly adopted internal Union remedy. See *infra*, at 240, and n. 41.

[35] It is plainly not an adequate remedy to limit the use of the actual dollars collected from dissenting employees to collective-bargaining purposes: "[Such a limitation] is of bookkeeping significance only rather than a matter of real substance. It must be remembered that the service fee is admittedly the exact equal of membership initiation fees and monthly dues . . . and that . . . dues collected from members may be used for a 'variety of purposes, in addition to meeting the union's costs of collective bargaining.' Unions 'rather typically' use their membership dues 'to do those things which the members authorize the union to do in their interest and on their behalf.' If the union's total budget is divided between collective bargaining and institutional expenses and if nonmember payments, equal to those of a member, go entirely for collective bargaining costs, the nonmember will pay more of these expenses than his pro rata share. The member will pay less and to that extent a portion of his fees and dues is available to pay institutional expenses. The union's budget is balanced. By paying a larger share of collective bargaining costs the nonmember subsidizes the union's institutional activities." *Retail Clerks* v. *Schermerhorn*, 373 U. S. 746, 753–754.

the Court found those expenditures illegal under the Railway Labor Act. See *supra*, at 219–220. Moreover, in that case each plaintiff had "made known to the union representing his craft or class his dissent from the use of his money for political causes which he opposes." 367 U. S., at 750; see *id.*, at 771. The Court found that "[i]n that circumstance, the respective unions were without power to use payments thereafter tendered by them for such political causes." *Ibid.* Since, however, *Hanson* had established that the union-shop agreement was not unlawful as such, the Court held that to enjoin its enforcement would "[sweep] too broadly." 367 U. S., at 771. The Court also found that an injunction prohibiting the union from expending dues for political purposes would be inappropriate, not only because of the basic policy reflected in the Norris-La Guardia Act [36] against enjoining labor unions, but also because those union members who do wish part of their dues to be used for political purposes have a right to associate to that end "without being silenced by the dissenters." *Id.*, at 772–773.[37]

After noting that "dissent is not to be presumed" and that only employees who have affirmatively made known to the union their opposition to political uses of their funds are entitled to relief, the Court sketched two possible remedies: First, "an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from him as is the proportion of the union's total expenditures made for such political activities to the union's total budget"; and second, restitution of a fraction of union dues paid equal to the fraction of total union expenditures that were made for political purposes opposed by the employee. *Id.*, at 774–775.[38]

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[36] 29 U. S. C. §§ 101–115.

[37] See *supra*, at 234, and n. 30.

[38] In proposing a restitution remedy, the *Street* opinion made clear

The Court again considered the remedial question in *Railway Clerks* v. *Allen*, 373 U. S. 113. In that case employees who had refused to pay union-shop dues obtained injunctive relief in state court against enforcement of the union-shop agreement. The employees had not notified the union prior to bringing the lawsuit of their opposition to political expenditures, and at trial, their testimony was principally that they opposed such expenditures, as a general matter. *Id.*, at 118–119, n. 5. The Court held that the employees had adequately established their cause of action by manifesting "opposition to *any* political expenditures by the union," *id.*, at 118 (emphasis in original), and that the requirement in *Street* that dissent be affirmatively indicated was satisfied by the allegations in the complaint that was filed, 373 U. S., at 118–119, and n. 6.[39] The Court indicated again the appropriateness of the two remedies sketched in *Street;* reversed the judgment affirming issuance of the injunction; and remanded for determination of which expenditures were properly to be characterized as political and what percentage of total union expenditures they constituted.[40]

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that "[t]here should be no necessity, however, for the employee to trace his money up to and including its expenditure; if the money goes into general funds and no separate accounts of receipts and expenditures of the funds of individual employees are maintained, the portion of his money the employee would be entitled to recover would be in the same proportion that the expenditures for political purposes which he had advised the union he disapproved bore to the total union budget." 367 U. S., at 775.

[39] *Allen* can be viewed as a relaxation of the conditions established in *Street* governing eligibility for relief. See *Allen*, 373 U. S., at 129–131 (Harlan, J., concurring in part and dissenting in part). *Street* seemed to imply that an employee would be required to identify the *particular* causes which he opposed. 367 U. S., at 774–775. Any such implication was clearly disapproved in *Allen*, and, as explained today, see *infra*, at 241, there are strong reasons for preferring the approach of *Allen*.

[40] The Court in *Allen* went on to elaborate:

"Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calcu-

The Court in *Allen* described a "practical decree" that could properly be entered, providing for (1) the refund of a portion of the exacted funds in the proportion that union political expenditures bear to total union expenditures, and (2) the reduction of future exactions by the same proportion. 373 U. S., at 122. Recognizing the difficulties posed by judicial administration of such a remedy, the Court also suggested that it would be highly desirable for unions to adopt a "voluntary plan by which dissenters would be afforded an internal union remedy." *Ibid.* This last suggestion is particularly relevant to the case at bar, for the Union has adopted such a plan since the commencement of this litigation.[41]

Although *Street* and *Allen* were concerned with statutory rather than constitutional violations, that difference surely could not justify any lesser relief in this case. Judged by the standards of those cases, the Michigan Court of Appeals' ruling that the appellants were entitled to no relief at this juncture was unduly restrictive. For all the reasons

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lated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion. Absolute precision in the calculation of such proportion is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise. And no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters' such exactions in support of political activities." 373 U. S., at 122.

[41] Under the procedure adopted by the Union, as explained in the appellees' brief, a dissenting employee may protest at the beginning of each school year the expenditure of any part of his agency-shop fee for "'activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours, and conditions of employment.'" The employee is then entitled to a pro rata refund of his service charge in accordance with the calculation of the portion of total Union expenses for the specified purposes. The calculation is made in the first instance by the Union, but is subject to review by an impartial board.

outlined in *Street*, the court was correct in denying the broad injunctive relief requested. But in holding that as a prerequisite to any relief each appellant must indicate to the Union the *specific* expenditures to which he objects, the Court of Appeals ignored the clear holding of *Allen*. As in *Allen*, the employees here indicated in their pleadings that they opposed ideological expenditures of *any* sort that are unrelated to collective bargaining. To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure.[42] It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative.

The Court of Appeals thus erred in holding that the plaintiffs are entitled to no relief if they can prove the

[42] In *Buckley* v. *Valeo*, the Court recognized that compelled disclosure of political campaign contributions and expenditures "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 424 U. S., at 64. See, *e. g.*, *Gibson* v. *Florida Legislative Comm.*, 372 U. S. 539; *Bates* v. *Little Rock*, 361 U. S. 516; *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449. The Court noted that "the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations," and that therefore our past decisions have extended constitutional protection to contributors and members interchangeably. 424 U. S., at 66, citing *California Bankers Assn.* v. *Shultz*, 416 U. S. 21, 78–79 (POWELL, J., concurring); *Bates* v. *Little Rock*, *supra*, at 518; and *United States* v. *Rumely*, 345 U. S. 41.

Disclosure of the specific causes to which an individual employee is opposed (which necessarily discloses, by negative implication, those causes the employee does support) may subject him to "economic reprisal, . . . threat of physical coercion, and other manifestations of public hostility," and might dissuade him from exercising the right to withhold support "because of fear of exposure of [his] beliefs . . . and of the consequences of this exposure." *NAACP* v. *Alabama ex rel. Patterson*, *supra*, at 462–463.

allegations contained in their complaints,[43] and in depriving them of an opportunity to establish their right to appropriate relief, such, for example, as the kind of remedies described in *Street* and *Allen*.[44] In view of the newly adopted Union internal remedy, it may be appropriate under Michigan law, even if not strictly required by any doctrine of exhaustion of remedies, to defer further judicial proceedings pending the voluntary utilization by the parties of that internal remedy as a possible means of settling the dispute.[45]

The judgment is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST, concurring.

Had I joined the plurality opinion in *Elrod* v. *Burns*, 427 U. S. 347 (1976), I would find it virtually impossible to join the Court's opinion in this case. In *Elrod*, the plurality stated:

> "The illuminating source to which we turn in performing the task [of constitutional adjudication] is the system

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[43] Although the appellants did not specifically pray for either of the remedies described in *Street* and *Allen*, the complaints in both *Abood* and *Warczak* included a general prayer for "such further and other relief as may be necessary, or may to the Court seem just and equitable."

The *Warczak* complaint was styled as a class action, but the trial court dismissed the complaint without addressing the propriety of class relief under Michigan law. We therefore have no occasion to address the question whether an individual employee who is not a named plaintiff but merely a member of the plaintiff class is, without more, entitled to relief under *Street* and *Allen* as a matter of federal law.

[44] See *supra*, at 237–240, and nn. 38, 40.

[45] We express no view as to the constitutional sufficiency of the internal remedy described by the appellees. If the appellants initially resort to that remedy and ultimately conclude that it is constitutionally deficient in some respect, they would of course be entitled to judicial consideration of the adequacy of the remedy.

> of government the First Amendment was intended to protect, a democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern. Our decision in obedience to the guidance of that source does not outlaw political parties or political campaigning and management. Parties are free to exist and their concomitant activities are free to continue. We require only that the rights of every citizen to believe as he will and to act and associate according to his beliefs be free to continue as well." *Id.*, at 372.

I do not read the Court's opinion as leaving intact the "unfettered judgment of each citizen on matters of political concern" when it holds that Michigan may, consistently with the First and Fourteenth Amendments, require an objecting member of a public employees' union to contribute to the funds necessary for the union to carry out its bargaining activities. Nor does the Court's opinion leave such a member free "to believe as he will and to act and associate according to his beliefs." I agree with the Court, and with the views expressed in MR. JUSTICE POWELL's opinion concurring in the judgment, that the positions taken by public employees' unions in connection with their collective-bargaining activities inevitably touch upon political concern if the word "political" be taken in its normal meaning. Success in pursuit of a particular collective-bargaining goal will cause a public program or a public agency to be administered in one way; failure will result in its being administered in another way.

I continue to believe, however, that the dissenting opinion of MR. JUSTICE POWELL in *Elrod* v. *Burns, supra,* which I joined, correctly stated the governing principles of First and Fourteenth Amendment law in the case of public employees such as this. I am unable to see a constitutional distinction between a governmentally imposed requirement that a public employee be a Democrat or Republican or else lose his job,

and a similar requirement that a public employee contribute to the collective-bargaining expenses of a labor union. I therefore join the opinion and judgment of the Court.

MR. JUSTICE STEVENS, concurring.

By joining the opinion of the Court, including its discussion of possible remedies, I do not imply—nor do I understand the Court to imply—that the remedies described in *Machinists* v. *Street*, 367 U. S. 740, and *Railway Clerks* v. *Allen*, 373 U. S. 113, would necessarily be adequate in this case or in any other case. More specifically, the Court's opinion does not foreclose the argument that the Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining. Any final decision on the appropriate remedy must await the full development of the facts at trial.*

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, concurring in the judgment.

The Court today holds that a State cannot constitutionally compel public employees to contribute to union political activities which they oppose. On this basis the Court concludes that "the general allegations in the complaints, if proved, establish a cause of action under the First and Fourteenth Amendments." *Ante*, at 237. With this much of the Court's opinion I agree, and I therefore join the Court's judgment remanding this case for further proceedings.

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*The case is before us on the equivalent of a motion to dismiss. *Ante*, at 213–214, n. 4. Our knowledge of the facts is limited to a bald assertion that the Union engages "'in a number and variety of activities and programs which are economic, political, professional, scientific and religious in nature of which Plaintiffs do not approve . . . .'" *Ante*, at 213, and n. 3. What, if anything, will be proved at trial is a matter for conjecture.

But the Court's holding and judgment are but a small part of today's decision. Working from the novel premise that public employers are under no greater constitutional constraints than their counterparts in the private sector, the Court apparently rules that public employees can be compelled by the State to pay full union dues to a union with which they disagree, subject only to a possible rebate or deduction if they are willing to step forward, declare their opposition to the union, and initiate a proceeding to establish that some portion of their dues has been spent on "ideological activities unrelated to collective bargaining." *Ante,* at 236. Such a sweeping limitation of First Amendment rights by the Court is not only unnecessary on this record; it is in my view unsupported by either precedent or reason.

I

The Court apparently endorses the principle that the State infringes interests protected by the First Amendment when it compels an individual to support the political activities of others as a condition of employment. See *ante,* at 222–223, 233–235. One would think that acceptance of this principle would require a careful inquiry into the constitutional interests at stake in a case of this importance. But the Court avoids such an inquiry on the ground that it is foreclosed by this Court's decisions in *Railway Employes' Dept.* v. *Hanson,* 351 U. S. 225 (1956), and *Machinists* v. *Street,* 367 U. S. 740 (1961). With all respect, the Court's reliance on these cases, which concerned only congressional authorization of union-shop agreements in the private sector, is misplaced.

A

The issue before the Court in *Hanson* was the constitutionality of the Railway Labor Act's authorization of union-shop agreements in the private sector. Section 2 Eleventh of that Act, 45 U. S. C. § 152 Eleventh, provides in essence that, notwithstanding any contrary provision of state law, employers

and unions are permitted to enter into voluntary agreements whereby employment is conditioned on payment of full union dues and fees. See *ante*, at 218 n. 11. The suit was brought by nonunion members who claimed that Congress had forced them into "ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights." 351 U. S., at 236.

Acceptance of this claim would have required adoption by the Court of a series of far-reaching propositions: (i) that there was sufficient governmental involvement in the private union-shop agreement to justify inquiry under the First Amendment; (ii) that a refusal to pay money to a union could be "speech" protected by the First Amendment; (iii) that Congress had interfered with or infringed that protected speech interest by authorizing union shops; and (iv) that the interference was unwarranted by any overriding congressional objective. The Court adopted only the first of these propositions: It agreed with the Supreme Court of Nebraska that § 2 Eleventh, by authorizing union-shop agreements that otherwise might be forbidden by state law, had involved Congress sufficiently to justify examination of the First Amendment claims.

On the merits the Court concluded that there was no violation of the First Amendment. The reasoning behind this conclusion was not elaborate. Some language in the opinion appears to suggest that even if Congress had compelled employers and employees to enter into union-shop agreements, the required financial support for the union would not infringe any protected First Amendment interest.[1] But the Court

[1] The Court compared the union shop to the organized bar: "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." 351 U. S., at 238. Mr. Justice Douglas, author of the Court's opinion in *Hanson*,

did not lose sight of the distinction between governmentally compelled financial support and the actual effect of the Railway Labor Act: "The union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements." (Footnote omitted.) 351 U. S., at 231. As the Court later reflected in *Street:*

> "[A]ll that was held in *Hanson* was that § 2, Eleventh was constitutional in its bare authorization of union-shop contracts requiring workers to give 'financial support' to unions legally authorized to act as their collective bargaining agents. . . ." 367 U. S., at 749.

To the extent that *Hanson* suggests that withholding financial support from unions is unprotected by the First Amendment against governmental compulsion, it is significantly undercut by the subsequent decision in *Street.* The claim before the Court in *Street* was similar to that in *Hanson:* minority employees complained that they were being forced by a union-shop agreement to pay full union dues. This time, however, the employees specifically complained that part of their dues was being used for political activities to which they were opposed. And this time the Court perceived that the constitutional questions were "of the utmost gravity." 367 U. S., at 749. In order to avoid having to decide those difficult questions, the Court read into the Act a restriction on a union's use of an employee's money for political activities: "[W]e hold . . . that § 2, Eleventh is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." *Id.,* at 768–769.

In so reading § 2 Eleventh to avoid "unnecessary constitutional decisions," 367 U. S., at 749, *Street* suggests a rethinking

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later remarked that "on reflection the analogy fails." *Lathrop* v. *Donohue,* 367 U. S. 820, 879 (1961) (dissenting opinion).

of the First Amendment issues decided so summarily—indeed, almost viewed as inconsequential—in *Hanson*. To be sure, precisely because the decision in *Street* does not rest explicitly on the Constitution, the opinion for the Court supplies no more reasoned analysis of the constitutional issues than did the opinion in *Hanson*. But examination of the Court's strained construction of the Railway Labor Act in light of the various separate opinions in *Street* suggests that the Court sought to leave open three important constitutional questions by taking the course that it did.

First, the Court's reading of the Act made it unnecessary to decide whether the withholding of financial support from a union's political activities is a type of "speech" protected against governmental abridgment by the First Amendment. Mr. Justice Douglas, who wrote the opinion for the Court in *Hanson* and provided the necessary fifth vote in *Street*, believed that "use of union funds for political purposes subordinates the individual's First Amendment rights to the views of the majority." 367 U. S., at 778. Mr. Justice Black expressed a similar view in dissent. *Id.*, at 790–791. But Mr. Justice Frankfurter, joined by Mr. Justice Harlan, strongly disagreed, *id.*, at 806, and the Court's reading of the statute made it unnecessary to resolve the dispute.

Second, the Court's approach made it possible to reserve judgment on whether, assuming protected First Amendment interests were implicated, Congress might go further in approving private arrangements that would interfere with those interests than it could in commanding such arrangements. Mr. Justice Douglas had no doubts that the constraints on Congress were the same in either case:

> "Since neither Congress nor the state legislatures can abridge [First Amendment] rights, they cannot grant the power to private groups to abridge them. As I read the First Amendment, it forbids any abridgment by government whether directly or indirectly." *Id.*, at 777.

But here, too, Mr. Justice Frankfurter disagreed:

> "[W]e must consider the difference between . . . compulsion and the absence of compulsion when Congress acts as platonically as it did, in a wholly non-coercive way. Congress has not commanded that the railroads shall employ only those workers who are members of authorized unions. . . . When we speak of the Government 'acting' in permitting the union shop, the scope and force of what Congress has done must be heeded. There is not a trace of compulsion involved—no exercise of restriction by Congress on the freedom of the carriers and the unions. . . ." *Id.*, at 806–807.

And here, too, the Court's reading of the statute permitted it to avoid an unnecessary constitutional decision.[2]

Finally, by placing its decision on statutory grounds, the Court was able to leave open the question whether, assuming the Act intruded on protected First Amendment interests, the intrusion could be justified by the governmental interests asserted on its behalf. *Hanson* made it unnecessary to address this issue with respect to funds exacted solely for collective bargaining.[3] And by reading the Railway Labor Act to pro-

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[2] The Court today simply reads the separate opinion of Mr. Justice Douglas in *Street* as expressing the holding of the Court in *Hanson*. *Ante*, at 227 n. 23; see *ante*, at 222–223. While it may be possible to read *Hanson* this way, see n. 1, *supra*, it is certainly unnecessary to do so in light of the issues actually presented and resolved in that case. The Court offers no explanation of why Justices Frankfurter and Harlan, who believed that "the scope and force of what Congress has done must be heeded," 367 U. S., at 807, would acquiesce in the finding of governmental action in *Hanson* if that finding represented a definitive ruling that governmental authorization of a private union-shop agreement subjects the agreement itself to the full constraints of the First Amendment.

[3] Whether because no First Amendment interests were implicated, or because Congress had done nothing affirmatively to infringe such interests, or because any infringement of First Amendment interests was necessary to serve overriding governmental purposes, the Court was unanimous that the

hibit a union's use of exacted funds for political purposes, *Street* made it unnecessary to discuss whether authorizing such a use of union-shop funds might ever be justified.[4]

In my view, these cases can and should be read narrowly. The only constitutional principle for which they clearly stand is the narrow holding of *Hanson* that the Railway Labor Act's authorization of voluntary union-shop agreements in the private sector does not violate the First Amendment. They do not hold that the withholding of financial support from a union is protected speech; nor do they signify that the government could constitutionally compel employees, absent a private union-shop agreement, to pay full union dues to a union representative as a condition of employment; nor do they say anything about the kinds of governmental interests that could justify such compulsion, if indeed justification were required by the First Amendment.

B

The Court's extensive reliance on *Hanson* and *Street* requires it to rule that there is no constitutional distinction between what the government can require of its own employees and what it can permit private employers to do. To me the distinction is fundamental. Under the First Amendment the government may authorize private parties to enter into voluntary agreements whose terms it could not adopt as its own.

We stressed the importance of this distinction only recently,

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Railway Labor Act was constitutional insofar as it protected private agreements that would compel payment of sufficient fees to cover collective-bargaining costs. 367 U. S., at 771; 778 (Douglas, J., concurring); 779 (opinion of Whittaker, J.); 791 (Black, J., dissenting); 804 (Frankfurter, J., dissenting).

[4] The Court explicitly reserved judgment on "the matter of expenditures for activities in the area between the costs which led directly to the complaint as to 'free riders,' and the expenditures to support union political activities." *Id.*, at 769–770.

in *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345 (1974). There a New York resident had brought suit against a private utility, claiming that she had been denied due process when the utility terminated her service without notice or a hearing and alleging that the utility's summary termination procedures had been "specifically authorized and approved" by the State. In sustaining dismissal of the complaint, we held that authorization and approval did not transform the procedures of the company into the procedures of the State:

> "The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action.'" *Id.*, at 357.

Had the State itself adopted the procedures it approved for the utility, it would have been subject to the full constraints of the Constitution.[5]

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[5] This is not to say, of course, that governmental authorization of private action is free from constitutional scrutiny under the Bill of Rights and the Fourteenth Amendment. The historical context of a facially permissive enactment may demonstrate that its purpose and effect are to bring about a result that the Constitution forbids the legislature to achieve by direct command. It is well established, for example, that a State cannot promote racial discrimination by laws designed to foster and encourage discriminatory practices in the private sector. See *Reitman* v. *Mulkey*, 387 U. S. 369 (1967); cf. *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 176–177 (1972). And the Court in *Street* would not have read the Railway Labor Act as restrictively as it did, had it not been concerned that a broader reading might result in the indirect curtailment of First Amendment rights by Congress. But I am not aware that the Court has ever before held, as it

An analogy is often drawn between the collective-bargaining agreement in labor relations and a legislative code. This Court has said, for example, that the powers of a union under the Railway Labor Act are "comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . ." *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 202 (1944). Some have argued that this analogy requires each provision of a private collective-bargaining agreement to meet the same limitations that the Constitution imposes on congressional enactments.[6] But this Court has wisely refrained from adopting this view and generally has measured the rights and duties embodied in a collective-bargaining agreement only against the limitations imposed by Congress. See *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U. S. 50, 62–65 (1975); *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 180–181 (1967).[7]

Similar constitutional restraint would be wholly inappropriate in the public sector. The collective-bargaining agreement to which a public agency is a party is not merely analogous to legislation, it has all of the attributes of legisla-

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apparently has today, that the same constitutional constraints invariably apply when the government fosters or encourages a result in the private sector by permissive legislation as when it commands that result by the full force of law.

[6] See Note, Individual Rights in Industrial Self-Government—A "State Action" Analysis, 63 Nw. U. L. Rev. 4 (1968); cf. Blumrosen, Group Interests in Labor Law, 13 Rutgers L. Rev. 432, 482–483 (1959).

[7] If collective-bargaining agreements were subjected to the same constitutional constraints as federal rules and regulations, it would be difficult to find any stopping place in the constitutionalization of regulated private conduct. "Most private activity is infused with the governmental in much the way that the union shop is. . . . Enacted and decisional law everywhere conditions and shapes the nature of private arrangements in our society. This is true with the commercial contract—regulated as it is by comprehensive uniform statutes—no less than with the collective bargaining agreement . . . ." H. Wellington, Labor and the Legal Process 244–245 (1968).

tion for the subjects with which it deals. Where a teachers' union, for example, acting pursuant to a state statute authorizing collective bargaining in the public sector, obtains the agreement of the school board that teachers residing outside the school district will not be hired, the provision in the bargaining agreement to that effect has the same force as if the school board had adopted it by promulgating a regulation. Indeed, the rule in Michigan is that where a municipal collective-bargaining agreement conflicts with an otherwise valid municipal ordinance, the ordinance must yield to the agreement. *Detroit Police Officers Assn.* v. *Detroit,* 391 Mich. 44, 214 N. W. 2d 803 (1974) (holding that a duly enacted residency requirement for police must yield to any contrary agreement reached by collective bargaining).

The State in this case has not merely authorized agency-shop agreements between willing parties; it has negotiated and adopted such an agreement itself. Acting through the Detroit Board of Education, the State has undertaken to compel employees to pay full fees equal in amount to dues to a union as a condition of employment. Accordingly, the Board's collective-bargaining agreement, like any other enactment of state law, is fully subject to the constraints that the Constitution imposes on coercive governmental regulation.[8]

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[8] Cf. Summers, Public Sector Bargaining: Problems of Governmental Decisionmaking, 44 U. Cin. L. Rev. 669, 670 (1975):

"The uniqueness of public employment is not in the employees nor in the work performed; the uniqueness is in the special character of the employer. The employer is government; the ones who act on behalf of the employer are public officials; and the ones to whom those officials are answerable are citizens and voters. We have developed a whole structure of constitutional and statutory principles, and a whole culture of political practices and attitudes as to how government is to be conducted, what powers public officials are to exercise, and how they are to be made answerable for their actions. Collective bargaining by public employers must fit within the governmental structure and must function consistently with our governmental processes; the problems of the public employer

Because neither *Hanson* nor *Street* confronted the kind of governmental participation in the agency shop that is involved here, those cases provide little or no guidance for the constitutional issues presented in this case.[9] With the understanding, therefore, that the Court writes on a clean constitutional slate in the field of public-sector collective bargaining, I turn to the merits.

II

The Court today holds that compelling an employee to finance a union's "ideological activities unrelated to collective bargaining" violates the First Amendment, regardless of any asserted governmental justification. *Ante*, at 236. But the Court also decides that compelling an employee to finance any union activity that may be "related" in some way to collective bargaining is permissible under the First Amendment because such compulsion is "relevant or appropriate" to asserted governmental interests. *Ante*, at 222–223, 225 n. 20. And the Court places the burden of litigation on the individual. In order to vindicate his First Amendment rights in a union

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accommodating its collective bargaining function to government structures and processes is what makes public sector bargaining unique."

[9] The Court's reliance on *Hanson* and *Street* is ambivalent, to say the least. *Street* construed § 2 Eleventh of the Railway Labor Act "to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." 367 U. S., at 768–769. The opinion distinguishes not only between those union activities which are related to collective bargaining and those which are not, but "between the use of union funds for political purposes and their expenditure for nonpolitical purposes." *Id.*, at 769 n. 17. Yet the Court today repudiates the latter distinction, holding that nothing turns on whether union activity may be characterized as political. *Ante*, at 231–232. If it is true, as the Court believes, that *Hanson* and *Street* declare the limits of constitutional protection from a governmental union shop, *ante*, at 222–223, the Court's abandonment of the political-nonpolitical distinction drawn by those cases can only be explained by a desire to avoid its full implications in the public sector, where the subjects of bargaining are inherently political. See *infra*, at 256–258.

shop, the individual employee apparently must declare his opposition to the union and initiate a proceeding to determine what part of the union's budget has been allocated to activities that are both "ideological" and "unrelated to collective bargaining." *Ante,* at 237–241.

I can agree neither with the Court's rigid two-tiered analysis under the First Amendment, nor with the burden it places on the individual. Under First Amendment principles that have become settled since *Hanson* and *Street* were decided, it is now clear, first, that *any* withholding of financial support for a public-sector union is within the protection of the First Amendment; and, second, that the State should bear the burden of proving that any union dues or fees that it requires of nonunion employees are needed to serve paramount governmental interests.

A

The initial question is whether a requirement of a school board that all of its employees contribute to a teachers' union as a condition of employment impinges upon the First Amendment interests of those who refuse to support the union, whether because they disapprove of unionization of public employees or because they object to certain union activities or positions. The Court answers this question in the affirmative: "The fact that [government employees] are compelled to make . . . contributions for political purposes works . . . an infringement of their constitutional rights," *ante,* at 234, and *any* compelled support for a union "has an impact upon" and may be thought to "interfere in some way with" First Amendment interests. *Ante,* at 222. I agree with the Court as far as it goes, but I would make it more explicit that compelling a government employee to give financial support to a union in the public sector—regardless of the uses to which the union puts the contribution—impinges seriously upon interests in free speech and association protected by the First Amendment.

In *Buckley* v. *Valeo,* 424 U. S. 1 (1976), we considered the

constitutional validity of the Federal Election Campaign Act of 1971, as amended in 1974, which in one of its provisions limited the amounts that individuals could contribute to federal election campaigns. We held that these limitations on political contributions "impinge on protected associational freedoms":

> "Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. The Act's contribution ceilings thus limit one important means of associating with a candidate or committee . . . ." *Id.*, at 22.

That *Buckley* dealt with a contribution limitation rather than a contribution requirement does not alter its importance for this case. An individual can no more be required to affiliate with a candidate by making a contribution than he can be prohibited from such affiliation. The only question after *Buckley* is whether a union in the public sector is sufficiently distinguishable from a political candidate or committee to remove the withholding of financial contributions from First Amendment protection. In my view no principled distinction exists.

The ultimate objective of a union in the public sector, like that of a political party, is to influence public decisionmaking in accordance with the views and perceived interests of its membership. Whether a teachers' union is concerned with salaries and fringe benefits, teacher qualifications and in-service training, pupil-teacher ratios, length of the school day, student discipline, or the content of the high school curriculum, its objective is to bring school board policy and decisions into harmony with its own views. Similarly, to the extent that school board expenditures and policy are guided by decisions made by the municipal, State, and Federal Gov-

ernments, the union's objective is to obtain favorable decisions—and to place persons in positions of power who will be receptive to the union's viewpoint. In these respects, the public-sector union is indistinguishable from the traditional political party in this country.[10]

What distinguishes the public-sector union from the political party—and the distinction is a limited one—is that most of its members are employees who share similar economic interests and who may have a common professional perspective on some issues of public policy. Public school teachers, for example, have a common interest in fair teachers' salaries and reasonable pupil-teacher ratios. This suggests the possibility of a limited range of probable agreement among the class of individuals that a public-sector union is organized to represent. But I am unable to see why the likelihood of an area of consensus in the group should remove the protection of the First Amendment for the disagreements that inevitably will occur. Certainly, if individual teachers are ideologically opposed to public-sector unionism itself, as are the appellants in this case, *ante*, at 212–213, one would think that compelling them to affiliate with the union by contributing to it infringes their First Amendment rights to the same degree as compelling them to contribute to a political party. Under the First Amendment, the protection of speech does not turn on the likelihood or frequency of its occurrence.

Nor is there any basis here for distinguishing "collective-bargaining activities" from "political activities" so far as the interests protected by the First Amendment are concerned. Collective bargaining in the public sector is "political" in any meaningful sense of the word. This is most obvious when

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[10] The leadership of the American Federation of Teachers, with which the local union involved in this case is affiliated, has apparently taken the position that collective bargaining should extend to every aspect of educational policy within the purview of the school board. See J. Weitzman, The Scope of Bargaining in Public Employment 85–88 (1975).

public-sector bargaining extends—as it may in Michigan [11]—to such matters of public policy as the educational philosophy that will inform the high school curriculum. But it is also true when public-sector bargaining focuses on such "bread and butter" issues as wages, hours, vacations, and pensions. Decisions on such issues will have a direct impact on the level of public services, priorities within state and municipal budgets, creation of bonded indebtedness, and tax rates. The cost of public education is normally the largest element of a county or municipal budget. Decisions reached through collective bargaining in the schools will affect not only the teachers and the quality of education, but also the taxpayers and the beneficiaries of other important public services. Under our democratic system of government, decisions on these critical issues of public policy have been entrusted to elected officials who ultimately are responsible to the voters.[12]

Disassociation with a public-sector union and the expression of disagreement with its positions and objectives therefore lie at "the core of those activities protected by the First Amendment." *Elrod* v. *Burns*, 427 U. S. 347, 356 (1976) (plurality opinion).

"Although First Amendment protections are not confined

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[11] Michigan law requires public agencies to bargain with authorized unions on all "conditions of employment," Mich. Comp. Laws § 423.211 (1970), but does not limit the permissible scope of public-sector bargaining to such conditions.

[12] See Summers, *supra*, n. 8, at 672:

"The major decisions made in bargaining with public employees are inescapably political decisions. . . . Directly at issue are political questions of the size and allocation of the budget, the tax rates, the level of public services, and the long term obligations of the government. These decisions . . . are to be made by the political branches of government—by elected officials who are politically responsible to the voters. . . ."

See also *Hortonville School Dist.* v. *Hortonville Ed. Assn.*, 426 U. S. 482, 495 (1976); Wellington & Winter, Structuring Collective Bargaining in Public Employment, 79 Yale L. J. 805, 858–860 (1970).

> to 'the exposition of ideas,' *Winters* v. *New York*, 333 U. S. 507, 510 (1948), 'there is practically universal agreement that a major purpose of th[e] Amendment was to protect the free discussion of governmental affairs . . . .' *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966)." *Buckley*, 424 U. S., at 14.

As the public-sector agency shop unquestionably impinges upon the interests protected by the First Amendment, I turn to the justifications offered for it by the Detroit Board of Education.[13]

B

"Neither the right to associate nor the right to participate in political activities is absolute . . . ." *CSC* v. *Letter Carriers*, 413 U. S. 548, 567 (1973). This is particularly true in the field of public employment, where "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering* v. *Board of Education*, 391 U. S. 563, 568 (1968). Nevertheless, even in public employment, "a significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod* v. *Burns*, 427 U. S., at 362 (plurality opinion); accord, *id.*, at 381 (POWELL, J., dissenting).

> "The [governmental] interest advanced must be paramount, one of vital importance, and the burden is on the

[13] Compelled support of a private association is fundamentally different from compelled support of government. Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context.

> government to show the existence of such an interest. . . . [C]are must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice. Moreover, . . . the government must 'emplo[y] means closely drawn to avoid unnecessary abridgment . . . .' *Buckley* v. *Valeo*, *supra*, at 25." *Id.*, at 362–363 (plurality opinion).

The justifications offered by the Detroit Board of Education must be tested under this settled standard of review.[14]

As the Court points out, *ante*, at 224–226, the interests advanced for the compulsory agency shop that the Detroit Board of Education has entered into are much the same as those advanced for federal legislation permitting voluntary agency-shop agreements in the private sector. The agency shop is said to be a necessary adjunct to the principle of exclusive union representation; it is said to reduce the risk that nonunion employees will become "free riders" by fairly distributing the costs of exclusive representation; and it is said to promote the cause of labor peace in the public sector. *Ante*, at 220–221. While these interests may well justify encouraging agency-shop arrangements in the private sector, there is far less reason to believe they justify the intrusion

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[14] The Court's failure to apply the established First Amendment standards articulated in *Elrod* v. *Burns* and *Buckley* v. *Valeo* is difficult to explain in light of its concession that disassociation with a union's activities is entitled to full First Amendment protection regardless of whether those activities may be characterized as political. *Ante*, at 231–232, and n. 28. One may only surmise that those in the majority today who joined the plurality opinion in *Elrod* hold the unarticulated belief that compelled support of a public-sector union makes better public policy than compelled support of a political party. I am at a loss to understand why the State's decision to adopt the agency shop in the public sector should be worthy of greater deference, when challenged on First Amendment grounds, than its decision to adhere to the tradition of political patronage. See *Elrod*, 427 U. S., at 376–380, 382–387 (POWELL, J., dissenting).

upon First Amendment rights that results from compelled support for a union as a condition of government employment.

In *Madison School Dist.* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167, 175 (1976), we expressly reserved judgment on the constitutional validity of the exclusivity principle in the public sector. The Court today decides this issue summarily:

> "The confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement, are no different in kind from the evils that the exclusivity rule in the Railway Labor Act was designed to avoid." *Ante*, at 224.

I would have thought that "conflict" in ideas about the way in which government should operate was among the most fundamental values protected by the First Amendment. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964). That the "Constitution does not require all public acts to be done in town meeting or an assembly of the whole," *Bi-Metallic Investment Co.* v. *State Bd. of Equalization*, 239 U. S. 441, 445 (1915), does not mean that a State or municipality may agree to set public policy on an unlimited range of issues in closed negotiations with "one category of interested individuals." *Madison School Dist., supra*, at 175. Such a commitment by a governmental body to exclude minority viewpoints from the councils of government would violate directly the principle that "government must afford all points of view an equal opportunity to be heard." *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972).[15]

[15] By stressing the Union's duty of fair representation, *ante*, at 221–222, the Court may be suggesting that the State has provided an adequate means for minority viewpoints to be heard *within* the Union. But even if Michigan law could be read to impose a broad obligation on the union to listen to and represent the viewpoints of all employees on such issues as

The Court points out that the minority employee is not barred by the exclusivity principle from expressing his viewpoint, see *ante*, at 230. In a limited sense, this may be true. The minority employee is excluded in theory only from engaging in a meaningful dialogue with his employer on the subjects of collective bargaining, a dialogue that is reserved to the union. It is possible that paramount governmental interests may be found—at least with respect to certain narrowly defined subjects of bargaining—that would support this restriction on First Amendment interests. But "the burden is on the government to show the existence of such an interest." *Elrod* v. *Burns*, 427 U. S., at 362 (plurality opinion). Because this appeal reaches this Court on a motion to dismiss, the record is barren of any demonstration by the State that excluding minority views from the processes by which governmental policy is made is necessary to serve overriding governmental objectives. For the Court to sustain the exclusivity principle in the public sector in the absence of a carefully documented record is to ignore, rather than respect, "the importance of avoiding unnecessary decision of constitutional questions." *Ante*, at 236–237.

The same may be said of the asserted interests in eliminating the "free rider" effect and in preserving labor peace. It may be that the Board of Education is in a position to demonstrate

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curriculum reform, imposition of such an obligation on the Union could not relieve the school board of *its* responsibilities—at least, it could not do so unless the Union were declared to be a public agency to which the State had delegated some part of the school board's power. Yet such a delegation of state power, covering an unlimited range of the school board's responsibility to set school policy, see nn. 10 and 11, *supra*, would itself raise grave constitutional issues. If power to determine school policy were shifted in part from officials elected by the population of the school district to officials elected by the school board's employees, the voters of the district could complain with force and reason that their voting power and influence on the decisionmaking process had been unconstitutionally diluted. See *Kramer* v. *Union School Dist.*, 395 U. S. 621 (1969); *Hadley* v. *Junior College Dist.*, 397 U. S. 50 (1970).

that these interests are of paramount importance and that requiring public employees to pay certain union fees and dues as a condition of employment is necessary to serve those interests under an exclusive bargaining scheme. On the present record there is no assurance whatever that this is the case.[16]

Before today it had been well established that when state law intrudes upon protected speech, the State itself must shoulder the burden of proving that its action is justified by overriding state interests. See *Elrod* v. *Burns*, *supra*, at 363; *Healy* v. *James*, 408 U. S. 169, 184 (1972); *Speiser* v. *Randall*, 357 U. S. 513, 525–526 (1958). The Court, for the first time in a First Amendment case, simply reverses this principle. Under today's decision, a nonunion employee who would vindi-

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[16] Unions in the public sector may be expected to spend money in a broad variety of ways, some of which are more closely related to collective bargaining than others, and some of which are more likely to stimulate "ideological" opposition than others. With respect to many of these expenditures, arriving at the appropriate reconciliation of the employees' First Amendment interests with the asserted governmental interests will be difficult.

I should think that on some narrowly defined economic issues—teachers' salaries and pension benefits, for example—the case for requiring the teachers to speak through a single representative would be quite strong, while the concomitant limitation of First Amendment rights would be relatively insignificant. On such issues the case for requiring all teachers to contribute to the clearly identified costs of collective bargaining also would be strong, while the interest of the minority teacher, who is benefited directly, in withholding support would be comparatively weak. On other issues—including such questions as how best to educate the young—the strong First Amendment interests of dissenting employees might be expected to prevail.

The same may be said of union activities other than bargaining. The processing of individual grievances may be an important union service for which a fee could be exacted with minimal intrusion on First Amendment interests. But other union actions—such as a strike against a public agency—may be so controversial and of such general public concern that compelled financial support by all employees should not be permitted under the Constitution.

cate his First Amendment rights apparently must initiate a proceeding to prove that the union has allocated some portion of its budget to "ideological activities unrelated to collective bargaining." *Ante*, at 237–241. I would adhere to established First Amendment principles and require the State to come forward and demonstrate, as to each union expenditure for which it would exact support from minority employees, that the compelled contribution is necessary to serve overriding governmental objectives. This placement of the burden of litigation, not the Court's, gives appropriate protection to First Amendment rights without sacrificing ends of government that may be deemed important.

Syllabus

DOUGLAS, COMMISSIONER, VIRGINIA MARINE RESOURCES COMMISSION *v.* SEACOAST PRODUCTS, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

No. 75-1255. Argued January 17, 1977—Decided May 23, 1977

The federal enrollment and licensing laws, under which vessels engaged in domestic or coastwise trade or used for fishing are "enrolled" for the purpose of evidencing their national character and to enable them to obtain licenses regulating the use to which the vessels may be put *held* to pre-empt Virginia statutes that in effect prohibit nonresidents of Virginia from catching menhaden in the Virginia portion of Chesapeake Bay and that bar noncitizens (regardless of where they reside) from obtaining commercial fishing licenses for any kind of fish from Virginia. Hence, under the Supremacy Clause, the Virginia laws cannot prevent appellees, whose fishing vessels, though foreign owned, have been federally licensed, from fishing for menhaden in Virginia's waters. Pp. 271–287.

(a) *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), decided three decades after the federal enrollment and licensing laws were enacted (and which have been re-enacted without substantial change), established the invalidity of discriminatory state regulation of shipping as applied to vessels federally licensed to engage in the coasting trade, though subsequent decisions have permitted States to impose upon federal licensees reasonable nondiscriminatory conservation and environmental protection measures otherwise within the state police power. Pp. 274–279.

(b) The license does not merely establish the nationality of the vessel (which is performed by the enrollment) but "implies, unequivocally, an authority to licensed vessels to carry on" the activity for which they are licensed. *Gibbons, supra*, at 212. Pp. 280–282.

(c) The Virginia statutes, by prohibiting federally licensed vessels owned by nonresidents of Virginia from fishing in Chesapeake Bay and by not allowing such ships owned by noncitizens to catch fish anywhere in the Commonwealth, deny licensees their federally granted right to engage in fishing activities on the same terms as state residents. P. 283.

(d) The broad language of the Submerged Lands Act did not impliedly repeal the federal licensing laws. Pp. 283–284.

432 F. Supp. 1, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, STEWART, BLACKMUN, and STEVENS, JJ., joined, and in all but Parts II–D and III of which POWELL and REHNQUIST, JJ., joined. REHNQUIST, J., filed an opinion concurring in the judgment and concurring in part and dissenting in part, in which POWELL, J., joined, *post*, p. 287.

James E. Moore, Assistant Attorney General of Virginia, argued the cause for appellant. With him on the briefs were *Andrew P. Miller*, Attorney General, and *Anthony F. Troy* and *James E. Kulp*, Deputy Attorneys General.

John J. Loftin, Jr., argued the cause for appellees. With him on the brief were *Thomas H. Willcox, Jr.*, *James C. Howell*, and *Franklin G. Hunt*.*

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*Briefs of *amici curiae* urging reversal were filed by *Joseph E. Brennan*, Attorney General of Maine, *Edward F. Bradley, Jr.*, Assistant Attorney General, *David H. Souter*, Attorney General of New Hampshire, *Donald W. Stever, Jr.*, Assistant Attorney General, and *Julius C. Michaelson*, Attorney General of Rhode Island, for the States of Maine, New Hampshire, and Rhode Island; by *Francis X. Bellotti*, Attorney General, and *Terence P. O'Malley* and *Howard Whitehead*, Assistant Attorneys General, for the Commonwealth of Massachusetts; by *Louis J. Lefkowitz*, Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Philip Weinberg* and *John G. Proudfit*, Assistant Attorneys General, for the State of New York; and by *Ammon G. Dunton, Jr.*, and *Philip B. Kurland* for the Virginia Seafood Council et al.

Solicitor General Bork, *Assistant Attorney General Taft*, *Deputy Solicitor General Randolph*, *Bruce C. Rashkow*, and *Ralph J. Gillis* filed a brief for the United States as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Richard R. Wier, Jr.*, Attorney General, and *June D. MacArtor* and *Harrison F. Turner*, Deputy Attorneys General, for the State of Delaware; and by *Francis B. Burch*, Attorney General, *Henry R. Lord*, Deputy Attorney General, and *Warren K. Rich*, Assistant Attorney General, for the State of Maryland.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is the validity of two Virginia statutes that limit the right of nonresidents and aliens to catch fish in the territorial waters of the Commonwealth.

I

Persons or corporations wishing to fish commercially in Virginia must obtain licenses. Section 28.1–81.1 of the Virginia Code (§ 81.1) (Supp. 1976),[1] enacted in 1975, limits the

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[1] Section 28.1–81.1 provides:

"Licenses for taking of fish restricted to United States citizens.—(a) No commercial license for the taking of food fish or fish for the manufacture into fish meal, fish oil, fish scrap or other purpose shall be granted to any person not a citizen of the United States, nor to any firm, partnership, or association unless each participant therein shall be a citizen of the United States, nor to any corporation unless the same be a citizen of the United States as hereinafter defined. This requirement shall be in addition to, and not in lieu of, any other requisite to the issuance of a license imposed by this chapter or any other provision of the Code of Virginia as amended from time to time.

"(b) Within the meaning of this section, no corporation shall be deemed a citizen of the United States unless seventy-five per centum of the interest therein shall be owned by citizens of the United States and unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens and the corporation is organized under the laws of the United States or of a state, territory, district, or possession thereof.

"(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (i) if the title to seventy-five per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (ii) if seventy-five per centum of the voting power in such corporation is not vested in citizens of the United States; or (iii) if, through any contract or understanding, it is so arranged that more than twenty-five per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (iv) if by any other means whatsoever

issuance of commercial fishing licenses to United States citizens. Under this law, participants in any licensed partnership, firm, or association must be citizens. A fishing business organized in corporate form may be licensed only if it is chartered in this country; American citizens own and control at least 75% of its stock; and its president, board chairman, and controlling board majority are citizens.

Section 28.1–60 of the Virginia Code (§ 60) (Supp. 1976) [2]

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control of any interest in the corporation in excess of twenty-five per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States."

[2] Section 28.1–60 provides in pertinent part:

"Nonresidents generally.—(1) *Catching fish for oil or guano prohibited.*—No nonresident of this State shall take or catch any fish, in the waters of the Commonwealth, or in the waters under its joint jurisdiction, for the purpose of converting the same into oil, fish scrap, fish meal or guano, except as hereinafter provided; nor shall any nonresident be concerned or interested with any resident as partner or otherwise, except as a stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided.

"(2) *Resident not to be interested.*—Nor shall any resident of this State be concerned or interested with any nonresident as partner or otherwise, except as stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided, or knowingly permit any nonresident to use his name for either purpose.

"(3) *License for taking menhaden fish.*—A nonresident person, firm or corporation may take or catch the fish known as 'menhaden,' within the three-mile limit on the seacoast of Virginia and east of a straight line drawn from Cape Charles Lighthouse to Cape Henry Lighthouse for the purpose of converting the same into oil, fish scrap, fish meal or guano between the third Monday of May and the third Friday of November, inclusive, of each year; provided such person, firm or corporation has applied for and obtained license to take and catch such fish within the above-defined area and in accordance with the following requirements.

. . . . .

"(6) *Penalty for violation.*—Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor."

governs licensing of nonresidents of Virginia to fish for menhaden, an inedible but commercially valuable species of fin fish.[3] Section 60 allows nonresidents who meet the citizenship requirements of § 81.1 to obtain licenses to fish for menhaden in the three-mile-wide belt of Virginia's territorial sea off the Commonwealth's eastern coastline. At the same time, however, § 60 prohibits nonresidents from catching menhaden in the Virginia portion of Chesapeake Bay.

Appellee Seacoast Products, Inc., is one of three companies that dominate the menhaden industry. The other two firms, unlike Seacoast, have fish-processing plants in Virginia and are owned by American citizens. Hence, they are not affected by either of the restrictions challenged in this case. Seacoast was founded in New Jersey in 1911 and maintains its principal offices in that State; it is incorporated in Delaware and qualified to do business in Virginia. The other appellees are subsidiaries of Seacoast; they are incorporated and maintain plants and offices in States other than Virginia. In 1973,

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[3] The menhaden industry is, in terms of landed tonnage, the largest fishery in the United States, accounting for about 45% of our total commercial fish catch. The 1975 harvest was valued at about $50 million fresh and $80 million after processing. Menhaden are processed and used for industrial purposes including the manufacture of antibiotics, poultry and animal feed, paint, soap, lubricants, and, in Canada and Europe, margarine. The fish spend much of their life cycle in coastal estuaries or shallow water close to the ocean shore. Indeed, over 95% of the 1.8 billion pounds of menhaden taken in 1975 were caught within three miles of the coast. The fish are only found far offshore in deep water during the winter months along the South Atlantic coast. In March, they begin a northward migration traveling up the east coast in enormous schools, with some ultimately reaching north of Cape Cod. Most of the fish reverse this migration path in the fall. It is feasible to fish commercially for menhaden only during the migratory period when they are in large, dense schools close to the surface. Estuaries like the Chesapeake Bay are important nurturing grounds for the species. See U. S. Department of Commerce, Fisheries of the United States, 1975, pp. 18, 37 (1976); App. 24–25, 32–33, 73–89, 92–113.

the family of Seacoast's founder sold the business to Hanson Trust, Ltd., a United Kingdom company almost entirely owned by alien stockholders. Seacoast continued its operations unchanged after the sale. All of its officers, directors, boat captains, and crews are American citizens, as are over 95% of its plant employees.

At the time of its sale, Seacoast's fishing vessels were enrolled and licensed American-flag ships. See *infra*, at 272–274. Under 46 U. S. C. §§ 808, 835, the transfer of these vessels to a foreign-controlled corporation required the approval of the Department of Commerce. This was granted unconditionally over the opposition of Seacoast's competitors after a full public hearing that considered the effect of the transfer on fish conservation and management, on American workers and consumers, and on competition and other social and economic concerns. See 38 Fed. Reg. 29239–29240 (1973); 39 Fed. Reg. 7819, 33812–33813 (1974); App. 29–32. Following this approval, appellees' fishing vessels were re-enrolled and relicensed pursuant to 46 U. S. C. §§ 251–252, 263. They remain subject to all United States laws governing maritime commerce.

In past decades, although not recently, Seacoast had operated processing plants in Virginia and was thereby entitled to fish in Chesapeake Bay as a resident. Tr. of Oral Arg. 28–29, 34. More recently, Seacoast obtained nonresident menhaden licenses as restricted by § 60 to waters outside Chesapeake Bay. In 1975, however, § 81.1 was passed by the Virginia Legislature, c. 338, 1975 Va. Acts, and appellant James E. Douglas, Jr., the Commissioner of Marine Resources for Virginia, denied appellees' license applications on the basis of the new law. Seacoast and its subsidiaries were thereby completely excluded from the Virginia menhaden fishery.

Appellees accordingly filed a complaint in the District Court for the Eastern District of Virginia, seeking to have §§ 60 and 81.1 declared unconstitutional and their enforcement enjoined. A three-judge court was convened and it

struck down both statutes. It held that the citizenship requirement of § 81.1 was pre-empted by the Bartlett Act, 16 U. S. C. § 1081 *et seq.*, and that the residency restriction of § 60 violated the Equal Protection Clause of the Fourteenth Amendment. We noted probable jurisdiction of the Commissioner's appeal, 425 U. S. 949 (1976), and we affirm.[4]

II

Seacoast advances a number of theories to support affirmance of the judgment below. See *Fusari* v. *Steinberg*, 419 U. S. 379, 387 n. 13 (1975); *Dandridge* v. *Williams*, 397 U. S. 471, 475 n. 6 (1970). Among these is the claim that the Virginia statutes are pre-empted by federal enrollment and licensing laws for fishing vessels.[5] The United States has filed a brief as *amicus curiae* supporting this contention. Al-

[4] Appellant's contention that the District Court should have abstained in this case to allow the Virginia courts to decide the validity of the statutes is without merit. Appellant suggests that under recent decisions, *e. g.*, *In re Griffiths*, 413 U. S. 717 (1973); *Sugarman* v. *Dougall*, 413 U. S. 634 (1973); *Graham* v. *Richardson*, 403 U. S. 365 (1971), the alienage classification established in § 81.1 might well be ruled unconstitutional by the state courts as applied to individual resident aliens. That result is certainly plausible. See *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410 (1948). It is also irrelevant.

Abstention is proper in this context only where it can be "fairly concluded that the underlying state statute is susceptible of an interpretation that might avoid the necessity for constitutional adjudication." *Kusper* v. *Pontikes*, 414 U. S. 51, 55 (1973). But appellant's suggestion would not resolve any of the claims raised by appellees. In such circumstances, it is the "solemn responsibility" of "all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." *Zwickler* v. *Koota*, 389 U. S. 241, 248 (1967).

[5] Appellees argue in addition that federal fisheries law constitutes a comprehensive regulatory scheme not admitting of conflicting state laws. They also urge that the Virginia statutes violate the Equal Protection and Commerce Clauses and interfere with federal control of international relations.

though the claim is basically constitutional in nature, deriving its force from the operation of the Supremacy Clause, Art. VI, cl. 2, it is treated as "statutory" for purposes of our practice of deciding statutory claims first to avoid unnecessary constitutional adjudications. See *Hagans* v. *Lavine*, 415 U. S. 528, 549 (1974).[6] Since we decide the case on this ground, we do not reach the constitutional issues raised by the parties.

The well-known principles of pre-emption have been rehearsed only recently in our decisions. See, *e. g.*, *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525–526 (1977); *De Canas* v. *Bica*, 424 U. S. 351 (1976). No purpose would be served by repeating them here. It is enough to note that we deal in this case with federal legislation arguably superseding state law in a "field which . . . has been traditionally occupied by the States." *Jones* v. *Rath Packing Co.*, *supra*, at 525. Pre-emption accordingly will be found only if " 'that was the clear and manifest purpose of Congress.' *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)." *Ibid.* We turn our focus, then, to the congressional intent embodied in the enrollment and licensing laws.

A

The basic form for the comprehensive federal regulation of trading and fishing vessels was established in the earliest days of the Nation and has changed little since. Ships engaged in trade with foreign lands are "registered," a documentation procedure set up by the Second Congress in the Act of Dec. 31, 1792, 1 Stat. 287,[7] and now codified in 46 U. S. C., c. 2. "The purpose of a register is to declare the nationality of a

[6] The claim is, of course, statutory in the sense that it depends on interpretation of an Act of Congress, and like any other statutory decision, the result we reach here is subject to legislative overruling.

[7] Vessel documentation actually dates from the first months of the Federal Government. See Act of Sept. 1, 1789, 1 Stat. 55, repealed by the Acts discussed in the text.

vessel . . . and to enable her to assert that nationality wherever found." *The Mohawk*, 3 Wall. 566, 571 (1866); *Anderson* v. *Pacific Coast S. S. Co.*, 225 U. S. 187, 199 (1912). Vessels engaged in domestic or coastwise trade or used for fishing are "enrolled" under procedures established by the Enrollment and Licensing Act of Feb. 18, 1793, 1 Stat. 305, codified in 46 U. S. C., c. 12. "The purpose of an enrollment is to evidence the national character of a vessel . . . and to enable such vessel to procure a . . . license." *The Mohawk, supra; Anderson* v. *Pacific Coast S. S. Co., supra.*

A "license," in turn, regulates the use to which a vessel may be put and is intended to prevent fraud on the revenue of the United States. See 46 U. S. C. §§ 262, 263, 319, 325; 46 CFR § 67.01–13 (1976). The form of a license is statutorily mandated: "license is hereby granted for the . . . [vessel] to be employed in carrying on the (. . . 'coasting trade,' 'whale fishery,' 'mackerel fishery,' or 'cod fishery,' [8] as the case may be), for one year from the date hereof, and no longer." 46 U. S. C. § 263. The law also provides that properly enrolled and licensed vessels [9] "and no others, shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries." § 251. Appellees' vessels were granted licenses for the "mack-

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[8] The quaint categories of the statute have remained unchanged since the "mackerel fishery" was added by the Act of May 24, 1828, c. 119, 4 Stat. 312. They seem to correspond to the only three types of sea creatures sought by organized fishing fleets at that time. See L. Sabine, Report on the Principal Fisheries of the American Seas, H. R. Exec. Doc. No. 23, 32d Cong., 2d Sess., 181 (1853).

A license for the "mackerel fishery" entitles the holder to catch "cod or fish of any other description whatever." Act of Apr. 20, 1836, c. 55, 5 Stat. 16, 46 U. S. C. § 325; 46 CFR § 67.07–13 (b) (1976).

[9] A vessel of more than 5 but less than 20 tons need not be enrolled in order to obtain a license. See 46 U. S. C. §§ 251, 262, 263; 46 CFR §§ 67.01–1, 67.07–13 (a) (1976). No documentation is required for a vessel of less than five net tons. 46 CFR § 67.01–11 (a) (5) (1976).

erel fishery" [10] after their transfer was approved by the Department of Commerce.

The requirements for enrollment and registration are the same. 46 U. S. C. § 252; *The Mohawk, supra,* at 571–572. Insofar as pertinent here, enrolled and registered vessels must meet identification, measurement, and safety standards, generally must be built in the United States, and must be owned by citizens. An exception to the latter rule permits a corporation having alien stockholders to register or enroll ships if it is organized and chartered under the laws of the United States or of any State, if its president or chief executive officer and the chairman of its board of directors are American citizens, and if no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens. 46 U. S. C. § 11; 46 CFR § 67.03–5 (a) (1976). The Shipping Act, 1916, further limits foreign ownership of American vessels by requiring the Secretary of Commerce to approve any transfer of an American-owned vessel to noncitizens. 46 U. S. C. § 808.[11]

B

Deciphering the intent of Congress is often a difficult task, and to do so with a law the vintage of the Enrollment and Licensing Act verges on the impossible. There is virtually no surviving legislative history for the Act.[12] What we do have,

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[10] See n. 8, *supra.*

[11] A corporation is considered to be a citizen for purposes of this requirement only if it meets the same citizenship tests imposed for registration of a vessel and, in addition, if citizens own a controlling interest in it, or for a vessel used in the coastwise trade, if citizens own a 75% interest. 46 U. S. C. § 802.

As noted above, appellees received approval from the Secretary of Commerce for the transfer of their vessels to the ultimate ownership of the noncitizen Hanson Trust, Ltd.

[12] See 3 Annals of Cong. 671, 728, 738, 748, 750, 752 (1972). This history contains no debates; it merely records the legislative steps in passage of the Act. There are no committee reports available.

however, is the historic decision of Mr. Chief Justice John Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), rendered only three decades after passage of the Act. *Gibbons* invalidated a discriminatory state regulation of shipping as applied to vessels federally licensed to engage in the coasting trade. Although its historic importance lies in its general discussion of the commerce power, *Gibbons* also provides substantial illumination on the narrower question of the intended meaning of the Licensing Act.

The case challenged a New York law intended to encourage development of steamboats by granting Robert Fulton and Robert Livingston the exclusive right to operate steam-powered vessels in all of the State's territorial waters. The right to navigate steamboats between Elizabethtown Point, N. J., and New York City was, by assignment from Fulton and Livingston, granted to Aaron Ogden. Thomas Gibbons began operating two passenger ferries in violation of Ogden's submonopoly. Gibbons' steamboats had been enrolled and granted "license . . . to be employed in carrying on the coasting trade" under the Enrollment and Licensing Act. *Id.*, at 203.

Ogden nevertheless obtained an injunction from the New York courts enforcing the monopoly by restraining Gibbons from running his ferries in New York waters. Chancellor James Kent rejected Gibbons' pre-emption claim based upon his federal licenses. Kent found that the sole purpose of the license was to "giv[e] to the vessel an *American* character," *i. e.*, to establish its nationality as an American-flag ship. This would have reduced various duties and taxes assessed under federal law, but in Kent's view, it did not oust the power of the State to regulate the use of chattels within its borders. 4 Johns. Ch. 150, 156–159 (1819). The highest state court affirmed, ruling that "the only effect" of the license was "to determine [the vessel's] national character, and the rate of duties which she is to pay." 17 Johns. 488, 509 (1820).

On appeal to this Court, Mr. Chief Justice Marshall held that the rights granted to Gibbons by federal law superseded the conflicting state-created rights asserted by Ogden. Marshall first considered the power of Congress under the Commerce Clause. He concluded that "[c]ommerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior," 9 Wheat., at 194, and that "[t]he power of Congress . . . , whatever it may be, must be exercised within the territorial jurisdiction of the several States." *Id.*, at 196. The Court next defined the nature of the commerce power: "the power to regulate; that is, to prescribe the rule by which commerce is to be governed." *Ibid.* Ogden's claim that the States may exercise concurrent power over commerce, or even exercise their police powers, where that exercise conflicts with express federal law was rejected. *Id.*, at 200–210.

The Court then turned to the question whether "the laws of New-York" did "come into collision with an act of Congress" so that "the acts of New-York must yield to the law of Congress." *Id.*, at 210. Mr. Chief Justice Marshall found the conflict unquestionable: "To the Court it seems very clear, that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies, unequivocally, an authority to licensed vessels to carry on the coasting trade." *Id.*, at 212. The license granted to Gibbons under the Act "must be understood to be what it purports to be, a legislative authority to [Gibbons'] steamboat . . . 'to be employed in carrying on the coasting trade, for one year from this date.'" *Id.*, at 214. The Court rejected Ogden's argument—and the holding of the New York courts—that the license "gives no right to trade; and that its sole purpose is to confer the American character." *Ibid.* Finally, the Court decided that the statutory phrase "coasting trade" encompassed the carriage of passengers for hire as well as the transport of goods. *Id.*, at 215–219.

Although *Gibbons* is written in broad language which might suggest that the sweep of the Enrollment and Licensing Act ousts all state regulatory power over federally licensed vessels, neither the facts before the Court nor later interpretations extended that far. *Gibbons* did not involve an absolute ban on steamboats in New York waters. Rather, the monopoly law allowed some steam vessels to ply their trade while excluding others that were federally licensed. The case struck down this discriminatory treatment. Subsequent decisions spelled out the negative implication of *Gibbons:* that States may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power.

For example, in *Smith v. Maryland,* 18 How. 71 (1855), the Court upheld a conservation law which limited the fishing implements that could be used by a federally licensed vessel to take oysters from state waters. The Court held that an "enrolment and license confer no immunity from the operation of valid laws of a State," *id.,* at 74, and that the law was valid because the State "may forbid all such acts as would render the public right [of fishery] less valuable, or destroy it altogether," *id.,* at 75. At the same time, the Court explicitly reserved the question of the validity of a statute discriminating against nonresidents. *Ibid.* To the same effect is the holding in *Manchester* v. *Massachusetts,* 139 U. S. 240 (1891). There, state law prohibited the use by any person of certain types of fishing tackle in specified areas. Though Manchester was a Rhode Island resident basing a claim on his federal fisheries license, the Court held that the statute

> "was evidently passed for the preservation of the fish, and makes no discrimination in favor of citizens of Massachusetts and against citizens of other States. . . . [T]he statute may well be considered as an impartial and reasonable regulation . . . and the subject is one which a State may well be permitted to regulate within its

> territory, in the absence of any regulation by the United States. The preservation of fish . . . is for the common benefit; and we are of opinion that the statute is not repugnant to the Constitution and the laws of the United States." *Id.*, at 265.

More recently, the same principle was applied in *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440 (1960), where we held that the city's Smoke Abatement Code was properly applicable to licensed vessels. Relying on earlier cases, we noted that "[t]he mere possession of a federal license . . . does not immunize a ship from the operation of the normal incidents of local police power." *Id.*, at 447. As an "[e]venhanded local regulation to effectuate a legitimate local public interest," *id.*, at 443, the ordinance was valid.

Although it is true that the Court's view in *Gibbons* of the intent of the Second Congress in passing the Enrollment and Licensing Act is considered incorrect by commentators,[13] its

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[13] Criticism began in the concurring opinion of Mr. Justice Johnson, 9 Wheat., at 222, 231–233. He thought the Enrollment and Licensing Act was simply the American formulation of a navigation Act, commonly used by commercial nations to encourage shipping on vessels owned and manned by their citizens to promote the local economy and assure maritime strength in case of war. See generally G. Gilmore & C. Black, Jr., The Law of Admiralty §§ 11–3, 11–4 (2d ed. 1975).

Chancellor Kent soon exercised his prerogative as the country's foremost legal scholar to take sharp exception to Marshall's statutory construction:

"If congress had intended that a coasting license should confer power and control, and a claim of sovereignty subversive of local laws of the states within their own jurisdictions, it was supposed they would have said so in plain and intelligible language, and not have left their claim of supremacy to be hidden from the observation and knowledge of the state governments, in the unpretending and harmless shape of a coasting license, obviously intended for other purposes.

. . . . . .

"The only great point on which the Supreme Court of the United States, and the courts of this state, have differed, is in the construction and effect given to a coasting license. . . . The formidable effect which has been given

provisions have been repeatedly re-enacted in substantially the same form.[14] We can safely assume that Congress was aware of the holding, as well as the criticism,[15] of a case so renowned as *Gibbons*. We have no doubt that Congress has ratified the statutory interpretation of *Gibbons* and its progeny. See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 414 n. 8 (1975); *Snyder* v. *Harris*, 394 U. S. 332, 339 (1969); *Francis* v. *Southern Pacific Co.*, 333 U. S. 445, 449–450 (1948). We consider, then, its impact on the Virginia statutes challenged in this case.

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to a coasting license, was a perfect surprise upon the judicial authorities of this state; and none of the persons concerned in the former decisions in our state courts on this subject, ever entertained the idea, as I apprehend, that congress intended, by a coasting license, a grant of power that was to bear down all state regulations of internal commerce that stood in its way." 1 J. Kent, Commentaries on American Law 408, 411 (1st ed. 1826).

Mr. Justice Frankfurter agreed, calling Marshall's view "esoteric statutory construction." F. Frankfurter, The Commerce Clause 15, 17, 20 (1937). See also R. Faulkner, The Jurisprudence of John Marshall 85 (1968); M. Baxter, The Steamboat Monopoly 34–35, 52 (1972); Campbell, Chancellor Kent, Chief Justice Marshall and the Steamboat Cases, 25 Syracuse L. Rev. 497, 519–532 (1974); Mann, The Marshall Court: Nationalization of Private Rights and Personal Liberty from the Authority of the Commerce Clause, 38 Ind. L. J. 117, 180–181, 209–212, 236–237 (1963).

[14] See Act of May 24, 1828, c. 119, 4 Stat. 312 (adding "mackerel fishery" category); Act of Apr. 20, 1836, c. 55, 5 Stat. 16 (permitting capture of all types of fish on mackerel license); Rev. Stat. §§ 4311, 4321 (1878) (codifying license provisions); Act of Apr. 18, 1874, c. 110, 18 Stat. 31 (exempting canal boats); Act of May 20, 1936, c. 434, 49 Stat. 1367 (license form amended and re-enacted). Cf. Act of Feb. 28, 1887, c. 288, 24 Stat. 435 (temporarily applying a fishing season for mackerel to federal licenses).

[15] In addition to the contemporary comments of Mr. Justice Johnson and Chancellor Kent, see n. 13, *supra*, Thomas Jefferson's well-publicized letters were highly critical of what he saw as undue expansion of federal power, exemplified by *Gibbons*. See 1 C. Warren, The Supreme Court in United States History 620–621 (1937 ed.).

C

The federal licenses granted to Seacoast are, as noted above, identical in pertinent part to Gibbons' licenses except that they cover the "mackerel fishery" rather than the "coasting trade." Appellant contends that because of the difference this case is distinguishable from *Gibbons*. He argues that *Gibbons* upheld only the right of the federal licensee, as an American-flag vessel, to navigate freely in state territorial waters. He urges that Congress could not have intended to grant an additional right to take fish from the waters of an unconsenting State. Appellant points out that the challenged statutes in no way interfere with the navigation of Seacoast's fishing boats. They are free to cross the State's waters in search of fish in jurisdictions where they may lawfully catch them, and they may transport fish through the State's waters with equal impunity.

Appellant's reading of *Gibbons* is too narrow. *Gibbons* emphatically rejects the argument that the license merely establishes the nationality of the vessel. That function is performed by the enrollment. 9 Wheat., at 214. Rather, the license "implies, unequivocally, an authority to licensed vessels to carry on" the activity for which they are licensed. *Id.*, at 212. In *Gibbons*, the "authority . . . to carry on" the licensed activity included not only the right to navigate in, or to travel across, state waters, but also the right to land passengers in New York and thereby provide an economically valuable service. The right to perform that additional act of landing cargo in the State—which gave the license its real value—was part of the grant of the right to engage in the "coasting *trade*." See *Harman* v. *Chicago*, 147 U. S. 396, 405 (1893).

The same analysis applies to a license to engage in the mackerel fishery. Concededly, it implies a grant of the right to navigate in state waters. But, like the trading license, it must give something more. It must grant "author-

ity . . . to carry on" the "mackerel *fishery.*" And just as *Gibbons* and its progeny found a grant of the right to trade in a State without discrimination, we conclude that appellees have been granted the right to fish in Virginia waters on the same terms as Virginia residents.

Moreover, 46 U. S. C. § 251 states that properly documented vessels "and no others" are "entitled to the privileges of vessels employed in the coasting trade or fisheries." Referring to this section, *Gibbons* held: "[T]hese privileges . . . cannot be enjoyed, unless the trade may be prosecuted. The grant of the privilege . . . convey[s] the right [to carry on the licensed activity] to which the privilege is attached." 9 Wheat., at 213. Thus, under § 251 federal licensees are "entitled" to the same "privileges" of fishery access as a State affords to its residents or citizens.

Finally, our interpretation of the license is reaffirmed by the specific discussion in *Gibbons* of the section granting the license, now 46 U. S. C. § 263. The Court pointed out that "a license to do any particular thing, is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license." 9 Wheat., at 213–214. *Gibbons* recognized that the "grantor" was Congress. *Id.*, at 213. Thus *Gibbons* expressly holds that the words used by Congress in the vessel license transfer to the licensee "all the right" which Congress has the power to convey. While appellant may be correct in arguing that at earlier times in our history there was some doubt whether Congress had power under the Commerce Clause to regulate the taking of fish in state waters,[16] there can be no question today that such power

[16] See, *e. g.*, *McCready* v. *Virginia*, 94 U. S. 391, 395 (1877) ("There has been . . . no . . . grant of power over the fisheries [to the United States]. These remain under the exclusive control of the State . . .");

exists where there is some effect on interstate commerce. *Perez* v. *United States*, 402 U. S. 146 (1971); *Heart of Atlanta Motel* v. *United States*, 379 U. S. 241 (1964); *Wickard* v. *Filburn*, 317 U. S. 111 (1942). The movement of vessels from one State to another in search of fish, and back again to processing plants, is certainly activity which Congress could conclude affects interstate commerce. Cf. *Toomer* v. *Witsell*, 334 U. S. 385, 403–406 (1948).[17] Accordingly, we hold that, at the least, when Congress re-enacted the license form in 1936,[18] using language which, according to *Gibbons*, gave licensees "all the right which the grantor can transfer," it necessarily extended the license to cover the taking of fish in state waters, subject to valid state conservation regulations.[19]

Manchester v. *Massachusetts*, 139 U. S. 240, 258–260 (1891); *Geer* v. *Connecticut*, 161 U. S. 519 (1896); 17 Cong. Rec. 4734 (1886) (conservation amendment to fisheries license, Act of Feb. 28, 1887, c. 288, 24 Stat. 435, see n. 14, *supra*, believed not to apply to state territorial waters).

[17] Appellant also cites cases describing fishing as a "local activity," *Alaska* v. *Arctic Maid*, 366 U. S. 199, 203 (1961), and as one that "occurs before the [fish] can be said to have entered the flow of interstate commerce," *Toomer* v. *Witsell*, 334 U. S., at 395. But these statements were made in upholding the right of States to tax what was argued to be interstate commerce. Pronouncements made in that context are not used interchangeably as statements of law where the issue is the power of Congress to regulate under the Commerce Clause. The restrictions imposed by the Commerce Clause standing alone may well be less than the pre-emptive reach of statutes passed by Congress pursuant to the power. Cf. *Wickard* v. *Filburn*, 317 U. S., at 121–122. No federal statutory claim was raised in *Toomer* or *Arctic Maid*, and in both cases the Court noted that the challenged statute did not discriminate against interstate commerce.

[18] Act of May 20, 1936, c. 434, 49 Stat. 1367. We are confident that Congress, in the midst of the New Deal legislative program, broadly construed its powers under the Commerce Clause at this time. See, *e. g.*, *Wickard* v. *Filburn*.

[19] Indeed, an amendment to the license form made at the time of the 1936 re-enactment specifically authorizes "the taking of fish." Acting to reverse a Circuit Court of Appeals decision, *The Pueblos*, 77 F. 2d 618

D

Application of the foregoing principles to the present case is straightforward. Section 60 prohibits federally licensed vessels owned by nonresidents of Virginia from fishing in the Chesapeake Bay. Licensed ships owned by noncitizens are prevented by § 81.1 from catching fish anywhere in the Commonwealth. On the other hand, Virginia residents are permitted to fish commercially for menhaden subject only to seasonal and other conservation restrictions not at issue here. The challenged statutes thus deny appellees their federally granted right to engage in fishing activities on the same terms as Virginia residents. They violate the "indisputable" precept that "no State may completely exclude federally licensed commerce." *Florida Lime & Avocado Growers* v. *Paul*, 373 U. S. 132, 142 (1963). They must fall under the Supremacy Clause.

Appellant seeks to escape this conclusion by arguing that the Submerged Lands Act, 67 Stat. 29, 43 U. S. C. §§ 1301–1315, and a number of this Court's decisions [20] recognize that the States have a title or ownership interest in the fish swimming in their territorial waters. It is argued that because the States "own" the fish, they can exclude federal licensees. The contention is of no avail.

The Submerged Lands Act does give the States "title," "ownership," and "the right and power to manage, administer, lease, develop, and use" the lands beneath the oceans and

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(CA2 1935), Congress authorized issuance of licenses for the "coasting trade and mackerel fishery." The amendment explains that vessels so documented "shall be deemed to have sufficient license for engaging in the coasting trade and the taking of fish of every description, including shellfish." 49 Stat. 1368, 46 U. S. C. § 263. See also S. Rep. No. 83, 24th Cong., 1st Sess. (1836), describing the modification in the Enrollment and Licensing Act, 5 Stat. 16, see nn. 8, 14, *supra*, as intended "to enable those engaged in the mackerel fishery to take other fish without incurring a penalty."

[20] See cases cited in n. 16, *supra*.

natural resources in the waters within state territorial jurisdiction. 43 U. S. C. §1311 (a). But when Congress made this grant pursuant to the Property Clause of the Constitution, see *Alabama* v. *Texas*, 347 U. S. 272 (1954), it expressly retained for the United States "all constitutional powers of regulation and control" over these lands and waters "for purposes of commerce, navigation, national defense, and international affairs." *United States* v. *Louisiana*, 363 U. S. 1, 10 (1960); see 43 U. S. C. § 1314 (a). Since the grant of the fisheries license is made pursuant to the commerce power, see *supra*, at 281–282; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365, 377 (1883), the Submerged Lands Act did not alter its pre-emptive effect. Certainly Congress did not repeal by implication, in the broad language of the Submerged Lands Act, the Licensing Act requirement of equal treatment for federal licensees.

In any event, "[t]o put the claim of the State upon title is," in Mr. Justice Holmes' words, "to lean upon a slender reed." *Missouri* v. *Holland*, 252 U. S. 416, 434 (1920). A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. *Ibid.*; *Geer* v. *Connecticut*, 161 U. S. 519, 539–540 (1896) (Field, J., dissenting). The "ownership" language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Toomer* v. *Witsell*, 334 U. S., at 402; see also *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410, 420–421 (1948). Under modern analysis, the question is simply whether the State has exercised its police power in

conformity with the federal laws and Constitution. As we have demonstrated above, Virginia has failed to do so here.[21]

III

Our decision is very much in keeping with sound policy considerations of federalism. The business of commercial fishing must be conducted by peripatetic entrepreneurs moving, like their quarry, without regard for state boundary lines. Menhaden that spawn in the open ocean or in coastal waters of a Southern State may swim into Chesapeake Bay and live there for their first summer, migrate south for the following winter, and appear off the shores of New York or Massachusetts in succeeding years. A number of coastal States have discriminatory fisheries laws,[22] and with all natural resources

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[21] Appellant claims that the challenged statutes have a legitimate conservation purpose. He argues that § 81.1 is a valid response to the grave problem of overfishing of American marine stocks by foreign fleets. Similarly, § 60 is said to be an essential enforcement mechanism for net-size restrictions on menhaden fishermen.

The claims are specious. Virginia makes no attempt to restrict the quantity of menhaden caught by her own residents. A statute that leaves a State's residents free to destroy a natural resource while excluding aliens or nonresidents is not a conservation law at all. It bears repeating that a "state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition." *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 538 (1949). A State cannot escape this principle by cloaking objectionable legislation in the currently fashionable garb of environmental protection. Moreover, despite its foreign ownership, Seacoast is subject to all United States shipping and fisheries laws. And the record does not support the claim based on enforcement of the net-size restriction.

Furthermore, the cases upon which appellant relies are factually distinguishable. In *McCready* v. *Virginia* and *Geer* v. *Connecticut* neither petitioner asserted a claim under a pre-emptive Act of Congress. *Smith* v. *Maryland*, 18 How. 71 (1855), *Manchester* v. *Massachusetts*, 139 U. S. 240 (1891), and *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440 (1960), did raise Licensing Act claims, but the statutes there upheld operated equally against residents and nonresidents.

[22] Among those States filing briefs as *amici curiae* in support of Virginia,

becoming increasingly scarce and more valuable, more such restrictions would be a likely prospect, as both protective and retaliatory measures.[23] Each State's fishermen eventually might be effectively limited to working in the territorial waters of their residence, or in the federally controlled fishery beyond the three-mile limit.[24] Such proliferation of residency requirements for commercial fishermen would create precisely the sort of Balkanization of interstate commercial activity that the Constitution was intended to prevent. See, *e. g.*, *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 532–539 (1949); cf. *Allenberg Cotton Co.* v. *Pittman*, 419 U. S. 20 (1974). We cannot find that Congress intended to allow any such result given the well-known construction of federal vessel licenses in *Gibbons*.

For these reasons, we conclude that §§ 60 and 81.1 are preempted by the federal Enrollment and Licensing Act. Insofar as these state laws subject federally licensed vessels owned by nonresidents or aliens to restrictions different from those applicable to Virginia residents and American citizens, they

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see, *e. g.*, Md. Nat. Res. Ann. Code §§ 4–703, 4–704 (b) (1974); Mass. Gen. Laws Ann. c. 130, § 99 (1974); Act of Feb. 20, 1923, 1923 Mass. Acts c. 35, as amended by Act of Mar. 13, 1962, 1962 Mass. Acts c. 219; Act of Mar. 23, 1936, 1936 Mass. Acts c. 158; N. Y. Envir. Conserv. Law §§ 13–0333 (4), 13–0335 (2), 13–0341 (7) (McKinney 1973). See also Va. Code Ann. § 28.1–57 (1973).

[23] The Court was aware of this threat in *Gibbons*. A number of States had enacted steamboat monopoly legislation. See, *e. g.*, Abel, Commerce Regulation before *Gibbons v. Ogden:* Interstate Transportation Facilities, 25 N. C. L. Rev. 121, 159–160 (1947); M. Baxter, The Steamboat Monopoly 7, 16 (1972). Connecticut and Ohio retaliated against the Livingston-Fulton monopoly by forbidding its licensees from entering their waters; New Jersey not only did that, but also granted a right of action for treble damages against anyone obtaining an injunction under New York law. See *Gibbons* v. *Ogden*, 9 Wheat., at 4–5 (argument of Daniel Webster); Abel, *supra*, at 160; Baxter, *supra*, at 25–30.

[24] As of March 1, 1977, United States jurisdiction for fishery management was extended from 12 to 200 nautical miles from our coasts. 90 Stat. 336, 16 U. S. C. § 1811 (1976 ed.).

must fall under the Supremacy Clause. As we have noted above, however, reasonable and evenhanded conservation measures, so essential to the preservation of our vital marine sources of food supply, stand unaffected by our decision.

The judgment of the District Court is

Affirmed.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE POWELL joins, concurring in the judgment and concurring in part and dissenting in part.

I concur in the judgment of the Court and join in all but Parts II–D, and III of its opinion. As the Court states, it appears that licenses issued to appellees' ships under the federal licensing statute, 46 U. S. C. § 263, confer upon their grantees an affirmative right to engage in fishing activities in the coastal waters of the United States on the same terms as any other fishermen. I also agree that the federal statute pre-empts similar state licensing legislation which would allow some to engage in the fishery while absolutely excluding any federal licensees. This, I believe, is as much as need be said to decide the case before us. Rather than stopping there, however, the Court embroiders upon this holding a patchwork of broader language whose purpose is almost as uncertain as its long-run effect.

The Court's treatment of the States' interests in their coastal fisheries appears to me to cut a somewhat broader swath than is justifiable in this context. True enough, the States do not "own" free-swimming creatures within their territorial limits in any conventional sense of that term, *Missouri* v. *Holland*, 252 U. S. 416, 434 (1920); *Pierson* v. *Post*, 3 Cai. 175 (N. Y. 1805). It is therefore no answer to an assertion of federal pre-emptive power that such action amounts to an unconstitutional appropriation of state property. But it is also clear that the States have a substantial proprietary interest—sometimes described as "common ownership," *Geer* v. *Connecticut*, 161 U. S. 519, 529 (1896)—in

the fish and game within their boundaries. This is worthy of mention not because it is inconsistent with anything contained in the Court's opinion, but because I am not sure that the States' substantial regulatory interests are given adequate shrift by a single sentence casting the issue of state regulation as "simply whether the State has exercised its police power in conformity with the federal laws and Constitution." *Ante*, at 284–285.

The precedents of this Court, none of which are disputed today, have upheld a variety of regulations designed to conserve and maintain the collective natural resources of the State. *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440 (1960); *Patsone* v. *Pennsylvania*, 232 U. S. 138 (1914); *Geer* v. *Connecticut*, *supra*; *Manchester* v. *Massachusetts*, 139 U. S. 240 (1891); *McCready* v. *Virginia*, 94 U. S. 391 (1877); *Smith* v. *Maryland*, 18 How. 71 (1855); see *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410, 420–421 (1948). The exact bases for these decisions vary, but the cases are consistent in recognizing that the retained interests of States in such common resources as fish and game are of substantial legal moment, whether or not they rise to the level of a traditional property right. The range of regulations which a State may invoke under these circumstances is extremely broad. Neither mere displeasure with the asymmetry of the pattern of state regulation, nor a sensed tension with a federal statute will suffice to override a state enactment affecting exploitation of such a resource. Barring constitutional infirmities, only a direct conflict with the operation of federal law—such as exists here—will bar the state regulatory action. See *Jones* v. *Rath Packing Co.*, 430 U. S. 519 (1977); *Florida Lime & Avocado Growers* v. *Paul*, 373 U. S. 132, 142 (1963). This is true no matter how "peripatetic" the objects of the regulation or however "Balkanized" the resulting pattern of commercial activity. *Ante*, at 285–287.

Also, I think the Court has decided more than it properly

can in its reading of the Submerged Lands Act. While recognizing the Act as effecting a conveyance to the States of primary ownership and control of both "the lands beneath the oceans and natural resources in the waters within state territorial jurisdiction," *ante*, at 283–284, the Court makes more than can be justified of the statute's clause reserving federal control for "purposes of commerce, navigation, national defense, and international affairs." 43 U. S. C. § 1314 (a). It concludes on the basis of this reservation clause that since the enrollment and licensing statute was enacted under the commerce power, the Submerged Lands Act cannot have altered its pre-emptive effect.

I agree that the Submerged Lands Act does not countermand the pre-emption worked by the federal licensing legislation, but this is not because that legislation was enacted pursuant to one of the four categories of constitutional powers explicitly reserved to the Federal Government in the Act. It seems to me a difficult issue, not to be decided in a single sentence, whether the States take only a statutory title and right of control subject to those encumbrances previously created by exercise of the commerce, navigation, national defense, and international affairs powers. An alternative reading would be that the reservation-of-powers clause only gives fair warning of the possibility that the Government may, at some future time and in furtherance of these specified powers, find it necessary to intrude upon state ownership and management of the coastal submerged lands and natural resources. Such a view would take the statute for what it appears to be on its face—a quitclaim of the entire interest held by the Government when the Act was enacted—rather than a transfer of that interest subject to regulatory enactments previously passed under one of the four powers.

Interpretation of this reservation clause seems unnecessary to me at this time because the primary grant of the Act does not extend to any interest over free-swimming fish. The

title of the statutory section, as originally enacted and as codified, is "Lands Beneath Navigable Waters Within State Boundaries." 67 Stat. 30, 43 U. S. C., c. 29, subch. II. From this and from its language, the statute appears primarily to be a transfer of all property interest in land and natural resources within the three-mile limit. See *United States* v. *Alaska*, 422 U. S. 184, 187 (1975). Section 1311 (a)(1) conveys "title" and "ownership"—to such land and resources and for that reason could not reasonably refer to free-swimming fish which are incapable of such ownership. Section 1311 (a)(2) confers right of administration and control, and identifies the object of the conveyance again as the land and natural resources. Unless the Federal Government had an exclusive power of administration and control over fish—and the background of the legislation does not suggest that it did, see *United States* v. *California*, 332 U. S. 19, 36 (1947); *Skiriotes* v. *Florida*, 313 U. S. 69, 74–75 (1941)—then the § 1311 (a)(2) transfer of the power of administration did not, in fact, alter the pre-existing powers of the States over fish at all, even assuming that it purported to encompass "natural resources" beyond those as to which title was transferred in § 1311 (a)(1). Such legislation which neither affects the actual regulatory powers of the States, nor is explicit in stating that pre-existing federal regulatory measures are repealed, lacks the indicia of intent that would justify finding an implied repeal of federal legislation licensing the taking of fish in the coastal area. This is true quite apart from the reservation of powers in § 1314. I would limit our holding accordingly.

SMITH *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 75–1439. Argued December 8, 1976—Decided May 23, 1977

Petitioner, who had been indicted in the Southern District of Iowa for mailing obscene materials in violation of 18 U. S. C. § 1461, unavailingly sought to propound questions to the jury panel on *voir dire* relating to the panel members' knowledge of the contemporary community standards in that District with regard to the depiction of sex and nudity. The case proceeded to trial and at the close of the Government's case and later, petitioner unsuccessfully moved for a directed verdict of acquittal on the grounds, *inter alia*, that the Iowa obscenity statute in effect at the time of petitioner's conduct, which proscribed only the dissemination of obscene materials to minors, set forth the applicable community standard, and that the prosecution had not proved that the materials at issue had offended that standard. Petitioner was convicted. The Court of Appeals affirmed, concluding (1) that petitioner's proposed community standards questions were impermissible since they concerned the ultimate question of guilt or innocence rather than juror qualifications, and (2) that the issue of offense to contemporary community standards was a federal question and was not to be determined on the basis of the state obscenity law. *Held:*

1. State law cannot define the contemporary community standards for appeal to the prurient interest and patent offensiveness that under *Miller* v. *California*, 413 U. S. 15, are applied in determining whether or not material is obscene, and the Iowa obscenity statute is therefore not conclusive as to those standards. In federal prosecutions, such as this for violation of § 1461, those issues are fact questions for the jury, to be judged in light of its understanding of contemporary community standards. Pp. 299–308.

(a) Though state legislatures are not completely foreclosed from setting substantive limitations for obscenity cases, they cannot declare what community standards shall be, any more than they could undertake to define "reasonableness." Cf. *Hamling* v. *United States*, 418 U. S. 87, 104–105. Pp. 301–303.

(b) The community standards aspects of § 1461 implicate federal, not state, law. It is not material that the mailings here were solely intrastate, since § 1461 was enacted under Congress' constitutional postal power, not the commerce power. Pp. 303–305.

(c) Obscenity convictions remain reviewable on various grounds. Pp. 305–306.

(d) This Court's holding that the Iowa statute (which was properly admitted into evidence) is not conclusive on the issue of contemporary community standards does not nullify state law, but a State's right not to regulate in the obscenity field cannot correlatively compel the Federal Government to allow the mails to be used to send obscene materials into that State. Pp. 306–307.

2. The District Court did not abuse its discretion in refusing to ask the questions tendered by petitioner for *voir dire* about the jurors' understanding of community standards, which were no more appropriate than a request for a description of the meaning of "reasonableness" would have been. P. 308.

3. Section 1461 is not unconstitutionally vague as applied here since the type of conduct covered by the statute can be ascertained with sufficient ease to avoid due process pitfalls. Cf. *Hamling* v. *United States, supra*. Pp. 308–309.

Affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 309. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined, *post*, p. 310. STEVENS, J., filed a dissenting opinion, *post*, p. 311.

Tefft W. Smith argued the cause and filed briefs for petitioner.

Howard E. Shapiro argued the cause for the United States. On the brief were *Solicitor General Bork, Assistant Attorney General Thornburgh*, and *Jerome M. Feit*.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In *Miller* v. *California*, 413 U. S. 15 (1973), this Court rejected a plea for a uniform national standard as to what

*Briefs of *amici curiae* urging reversal were filed by *William D. North* for the American Library Assn. et al.; and by *Henry R. Kaufman* and *Ira M. Millstein* for the Association of American Publishers, Inc., et al.

Charles H. Keating, Jr., and *James J. Clancy* filed a brief for Citizens for Decency Through Law, Inc., as *amicus curiae* urging affirmance.

appeals to the prurient interest and as to what is patently offensive; the Court held, instead, that these essentially were questions of fact to be measured by contemporary standards of the community. *Id.*, at 30–34. The instant case presents the issue of the constitutional effect of state law that leaves unregulated the distribution of obscene material to adults, on the determination of contemporary community standards in a prosecution under 18 U. S. C. § 1461 for a mailing that is wholly intrastate. The case also raises the question whether § 1461 is unconstitutionally vague as applied in these circumstances, and the question whether the trial court, during the *voir dire* of prospective jurors, correctly refused to ask proffered questions relating to community standards.

I

Between February and October 1974 petitioner, Jerry Lee Smith, knowingly caused to be mailed various materials from Des Moines, Iowa, to post office box addresses in Mount Ayr and Guthrie Center, two communities in southern Iowa. This was done at the written request of postal inspectors using fictitious names. The materials so mailed were delivered through the United States postal system to the respective postmasters serving the addresses. The mailings consisted of (1) issues of "Intrigue" magazine, depicting nude males and females engaged in masturbation, fellatio, cunnilingus, and sexual intercourse; (2) a film entitled "Lovelace," depicting a nude male and a nude female engaged in masturbation and simulated acts of fellatio, cunnilingus, and sexual intercourse; and (3) a film entitled "Terrorized Virgin," depicting two nude males and a nude female engaged in fellatio, cunnilingus, and sexual intercourse.

II

For many years prior to 1974 the statutes of Iowa made it a misdemeanor to sell or offer to sell or to give away "any obscene, lewd, indecent, lascivious, or filthy book, pamphlet,

paper, . . . picture, photograph, writing . . ." or to deposit in any post office within Iowa any article of that kind. Iowa Code §§ 725.5 and 725.6 (1973).

In 1973, however, the Supreme Court of Iowa, in response to the standards enunciated in *Miller* v. *California*, *supra*, unanimously held that a related and companion Iowa statute, § 725.3 of the 1973 Code, prohibiting the presentation of any obscene or immoral drama, play, exhibition, or entertainment, was unconstitutionally vague and overbroad. *State* v. *Wedelstedt*, 213 N. W. 2d 652.[1] *Wedelstedt*, at least by implication—and we so assume—invalidated §§ 725.5 and 725.6 as well.

On July 1, 1974, Laws of Iowa 1974, cc. 1267 and 1268, became effective. These specifically repealed §§ 725.3, 725.5, and 725.6 of the 1973 Code. In addition, however, c. 1267 (thereafter codified as the first 10 sections of c. 725 of the 1975 Iowa Code) defined, among other things, "obscene material," and made it "a public offense" to disseminate obscene material to *minors* (defined as persons "under the age of eighteen"). Dissemination of obscene material to adults was not made criminal or even proscribed. Section 9[2] of c. 1267 (now § 725.9 of the 1975 Code) insured that the law would be applied uniformly throughout the State, and that no lesser

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[1] See also *State ex rel. Faches* v. *N. D. D., Inc.*, 228 N. W. 2d 191 (Iowa 1975) (State cannot enjoin the showing of certain movies under a statute relating to the use of premises "for the purpose of lewdness," when "lewdness" is not statutorily defined).

[2] "SEC. 9. . . . In order to provide for the uniform application of the provisions of this Act relating to obscene material applicable to minors within this state, it is intended that the sole and only regulation of obscene material shall be under the provisions of this Act, and no municipality, county or other governmental unit within this state shall make any law, ordinance or regulation relating to the availability of obscene materials. All such laws, ordinances or regulations, whether enacted before or after this Act, shall be or become void, unenforceable and of no effect upon the effective date of this Act" (July 1, 1974).

governmental unit would impose more stringent regulations on obscene material.

In 1976, the Iowa Legislature enacted a "complete revision" of the State's "substantive criminal laws." This is entitled the "Iowa Criminal Code" and is generally effective January 1, 1978. The existing definition of "obscene material" remains unchanged, but a new provision, § 2804 of the Criminal Code, Iowa Code Ann. (Spec. Pamphlet 1977), although limited in scope, applies by its terms to adults. It reads:

> "Any person who knowingly sells or offers for sale material depicting a sex act involving sado-masochistic abuse, excretory functions, a child, or bestiality which the average adult taking the material as a whole in applying contemporary community standards would find that it appeals to the prurient interest and is patently offensive; and the material, taken as a whole, lacks serious literary, scientific, political, or artistic value shall, upon conviction be guilty of a simple misdemeanor."

In summary, therefore, we have in Iowa (1) until 1973 state statutes that proscribed generally the dissemination of obscene writings and pictures; (2) the judicial nullification of some of those statutory provisions in that year for reasons of overbreadth and vagueness; (3) the enactment, effective July 1, 1974, of replacement obscenity statutes restricted in their application to dissemination to minors; and (4) the enactment in 1976 of a new Code, effective in 1978, with obscenity provisions, somewhat limited in scope, but not restricted in application to dissemination to minors.

Petitioner's mailings, described above and forming the basis of his federal prosecution, took place in 1974, *after* the theretofore existing Iowa statutes relating to obscene material had been nullified by *Wedelstedt*, but obviously *before* the 1976 legislation imposing misdemeanor liability with respect to certain transactions with adults becomes effective. Because

there is no contention that the materials petitioner mailed went to any minor, the 1974 legislation has no application to his case. And the 1976 legislation, of course, has no effect on petitioner's criminal liability. Cf. *Marks* v. *United States*, 430 U. S. 188 (1977).

Thus, what petitioner did clearly was not a violation of state law at the time he did it. It is to be observed, also, that there is no suggestion that petitioner's mailings went to any nonconsenting adult or that they were interstate.

III

Petitioner was indicted on seven counts of violating 18 U. S. C. § 1461, which prohibits the mailing of obscene materials.[3] He pleaded not guilty. At the start of his trial petitioner proposed and submitted six questions for *voir dire*.[4]

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[3] Section 1461 provides, in relevant part:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; . . .

. . . . . .

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section . . . to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

[4] Petitioner's proposed questions were:

"1. Are any members of the panel a member of or are in sympathy with any organization which has for its purpose the regulating or banning of alleged obscene materials?

"2. Will those jurors raise their hands who have any knowledge of the contemporary community standards existing in this federal judicial district relative to the depiction of sex and nudity in magazines and books?

"(The following individual questions are requested for each juror who answers the above question in the affirmative.)

[*Footnote 4 is continued on page 297*]

The court accepted in substance and utilized the first question; this was designed to reveal whether any juror was connected with an organization devoted to regulating or banning obscene materials. The court declined to ask the other five. One of the questions made inquiry as to whether the jurors had any knowledge of contemporary community standards in the Southern District of Iowa with regard to the depiction of sex and nudity. Two sought to isolate the source of the jurors' knowledge and their understanding of those standards. The remaining two would have explored the jurors' knowledge of Iowa law on the subject.

At the trial the Government introduced into evidence the actual materials covered by the indictment. It offered nothing else on the issue of obscenity *vel non*. Petitioner did not testify. Instead, in defense, he introduced numerous sexually explicit materials that were available for purchase at "adult" bookstores in Des Moines and Davenport, Iowa, several advertisements from the Des Moines Register and Tribune, and a copy of what was then c. 725 of the Iowa Code, prohibiting the dissemination of "obscene material" only to minors. At the close of the Government's case, and again at the close of all the evidence, petitioner moved for a directed verdict of acquittal on the grounds, *inter alia*, that the Iowa obscenity statute, proscribing only the dissemination of obscene materials to minors, set forth the applicable community standard, and that the prosecution had not proved that the materials at issue offended that standard.

The District Court denied those motions and submitted the case to the jury. The court instructed the jury that contemporary community standards were set by what is in fact

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"3. Where did you acquire such information?

"4. State what your understanding of those contemporary community standards are?

"5. In arriving at this understanding, did you take into consideration the laws of the State of Iowa which regulate obscenity?

"6. State what your understanding of those laws are?" App. 8.

accepted in the community as a whole. In making that determination, the jurors were entitled to draw on their own knowledge of the views of the average person in the community as well as the evidence presented as to the state law on obscenity and as to materials available for purchase. App. 22–23.

The jury found petitioner guilty on all seven counts. He was sentenced to concurrent three-year terms of imprisonment, all but three months of which were suspended, and three years' probation.

In his motion for a new trial, petitioner again asserted that Iowa law defined the community standard in a § 1461 prosecution. In denying this motion, the District Court held that § 1461 was "a federal law which neither incorporates nor depends upon the laws of the states," App. 33; the federal policy was simply different in this area. Furthermore, the court observed, Iowa's decision not to regulate distribution of obscene material did not mean that the people of Iowa necessarily "approve[d] of the permitted conduct," *ibid.;* whether they did was a question of fact for the jury. The court rejected petitioner's argument that it was error not to ask the jurors the question about the extent of their knowledge of contemporary community standards. It held that the jurors were entitled to draw on their own knowledge; *voir dire* on community standards would be no more appropriate than *voir dire* on the jurors' concept of "reasonableness." The court refused to hold that the Government was required to introduce evidence on a community standard in order to sustain its burden of proof. The materials introduced "can and do speak for themselves." *Id.*, at 34. The court did not address petitioner's vagueness point.[5]

The United States Court of Appeals for the Eighth Circuit,

[5] Despite the District Court's failure to discuss this point, we are satisfied that petitioner adequately preserved it for appellate review. See ¶ 7 of his motion for a new trial. App. 30.

by *per curiam* opinion, agreed with the District Court that the questions submitted by petitioner on community standards, except for the first, were impermissible, since they concerned the ultimate question of guilt or innocence rather than juror qualification. The court noted, however, that it was not holding that no questions whatsoever could be asked in that area. With respect to the effect of state law, the court held that the issue of offense to contemporary community standards was a federal question, and was to be determined by the jury in a federal prosecution. The court noted the admission of Iowa's obscenity statute into evidence but stated that this was designed to give the jury knowledge of the State's policy on obscenity when it determined the contemporary community standard. The state policy was not controlling, since the determination was for the jury. The conviction, therefore, was affirmed.

We granted certiorari in order to review the relationship between state legislation regulating or refusing to regulate the distribution of obscene material, and the determination of contemporary community standards in a federal prosecution. 426 U. S. 946 (1976).

IV

The "basic guidelines" for the trier of fact in a state obscenity prosecution were set out in *Miller* v. *California* in the form of a three-part test:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U. S., at 24 (citations omitted).

In two companion cases, the Court held that the *Miller* standards were equally applicable to federal legislation. *United*

States v. *12 200-ft. Reels of Film*, 413 U. S. 123, 129–130 (1973) (importation of obscene material, 19 U. S. C. § 1305 (a)); *United States* v. *Orito*, 413 U. S. 139, 145 (1973) (movement of obscene material in interstate commerce, 18 U. S. C. § 1462). In *Hamling* v. *United States*, 418 U. S. 87 (1974), it held, specifically, that the *Miller* standards applied in a § 1461 prosecution.

The phrasing of the *Miller* test makes clear that contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case.[6] The test

[6] The phrase "contemporary community standards" was first used in *Roth* v. *United States*, 354 U. S. 476 (1957). See generally F. Schauer, The Law of Obscenity 116–135 (1976). The *Roth* Court explained the derivation and importance of the community standards test as follows:

"The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. *Regina* v. *Hicklin*, [1868] L. R. 3 Q. B. 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity." 354 U. S., at 488–489 (footnotes omitted).

Although expressions in opinions vacillated somewhat before coming to the position that a national community standard was not constitutionally mandated, compare *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 488, and n. 10 (1962) (opinion of Harlan, J.), and *Jacobellis* v. *Ohio*, 378 U. S. 184, 195 (1964) (opinion of BRENNAN, J.), with *Miller* v. *California*, 413 U. S., at 30, the Court has never varied from the *Roth* position that the community as a whole should be the judge of obscenity, and not a small, atypical segment of the community. The only exception to this rule that has been recognized is for material aimed at a clearly defined deviant sexual group. *Mishkin* v. *New York*, 383 U. S. 502, 508 (1966). See *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 56 n. 6 (1973).

itself shows that appeal to the prurient interest is one such question of fact for the jury to resolve. The *Miller* opinion indicates that patent offensiveness is to be treated in the same way. 413 U. S., at 26, 30. See *Hamling* v. *United States*, 418 U. S., at 104–105.[7] The fact that the jury must measure patent offensiveness against contemporary community standards does not mean, however, that juror discretion in this area is to go unchecked. Both in *Hamling* and in *Jenkins* v. *Georgia*, 418 U. S. 153 (1974), the Court noted that part (b) of the *Miller* test contained a substantive component as well. The kinds of conduct that a jury would be permitted to label as "patently offensive" in a § 1461 prosecution are the "hard core" types of conduct suggested by the examples given in *Miller*.[8] See *Hamling* v. *United States*, 418 U. S., at 114; cf. *Jenkins* v. *Georgia*, 418 U. S., at 160–161. Literary, artistic, political, or scientific value, on the other hand, is not discussed in *Miller* in terms of contemporary community standards. See generally F. Schauer, The Law of Obscenity 123–124 (1976).

The issue we must resolve is whether the jury's discretion to determine what appeals to the prurient interest and what is patently offensive is circumscribed in any way by a state statute such as c. 725 of the Iowa Code. Put another way,

[7] See also *Jacobellis* v. *Ohio*, 378 U. S., at 191–192 (opinion of BRENNAN, J.); *Roth* v. *United States*, 354 U. S., at 487 n. 20; *United States* v. *Kennerley*, 209 F. 119, 121 (SDNY 1913) (L. Hand, J.) (obscenity should be determined in accordance with the "present critical point in the compromise between candor and shame at which the community may have arrived here and now"). Cf. *Manual Enterprises, Inc.* v. *Day*, 370 U. S., at 486 (opinion of Harlan, J.) (usually the elements of prurient interest and patent offensiveness will coalesce for this kind of material).

[8] The Court in *Miller* gave two "plain examples" of what a state statute could define for regulation:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." 413 U. S., at 25.

we must decide whether the jury is entitled to rely on its own knowledge of community standards, or whether a state legislature (or a smaller legislative body) may declare what the community standards shall be, and, if such a declaration has been made, whether it is binding in a federal prosecution under § 1461.

Obviously, a state legislature would not be able to define contemporary community standards in a vacuum. Rather, community standards simply provide the measure against which the jury decides the questions of appeal to prurient interest and patent offensiveness. In *Hamling* v. *United States*, the Court recognized the close analogy between the function of "contemporary community standards" in obscenity cases and "reasonableness" in other cases:

> "A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law." 418 U. S., at 104–105.

It would be just as inappropriate for a legislature to attempt to freeze a jury to one definition of reasonableness as it would be for a legislature to try to define the contemporary community standard of appeal to prurient interest or patent offensiveness, if it were even possible for such a definition to be formulated.

This is not to say that state legislatures are completely foreclosed from enacting laws setting substantive limitations for obscenity cases. On the contrary, we have indicated on several occasions that legislation of this kind is permissible. See *Hamling* v. *United States*, 418 U. S., at 114; *Miller* v. *California*, 413 U. S., at 25. State legislation must still define the kinds of conduct that will be regulated by the State. For example, the Iowa law in effect at the time this prosecution was instituted was to the effect that no conduct aimed at

adults was regulated.[9] At the other extreme, a State might seek to regulate all the hard-core pornography that it constitutionally could. The new Iowa law, which will regulate only material "depicting a sex act involving sado-masochistic abuse, excretory functions, a child, or bestiality," provides an example of an intermediate approach. Iowa Criminal Code § 2804.

If a State wished to adopt a slightly different approach to obscenity regulation, it might impose a geographic limit on the determination of community standards by defining the area from which the jury could be selected in an obscenity case, or by legislating with respect to the instructions that must be given to the jurors in such cases. In addition, the State might add a geographic dimension to its regulation of obscenity through the device of zoning laws. Cf. *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976). It is evident that ample room is left for state legislation even though the question of the community standard to apply, when appeal to prurient interest and patent offensiveness are considered, is not one that can be defined legislatively.

An even stronger reason for holding that a state law regulating distribution of obscene material cannot define contemporary community standards in the case before us is the simple fact that this is a *federal* prosecution under § 1461. The Court already has held, in *Hamling*, that the substantive conduct encompassed by § 1461 is confined to "the sort of 'patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller* v. *California*.'" 418 U. S., at 114. The community standards aspects of § 1461 likewise present issues of federal law, upon which a state statute such as Iowa's cannot have con-

[9] See also *Paris Adult Theatre I* v. *Slaton*, 413 U. S., at 64 (the States are free to adopt a "laissez-faire" policy "and drop all controls on commercialized obscenity, if that is what they prefer"); *United States* v. *Reidel*, 402 U. S. 351, 357 (1971) (nonregulation of obscenity for adults "may prove to be the desirable and eventual legislative course").

clusive effect.[10] The kinds of instructions that should be given to the jury are likewise a federal question. For example, the Court has held that § 1461 embodies a requirement that local rather than national standards should be applied.[11] *Hamling* v. *United States, supra.* Similarly, obscenity is to be judged according to the average person in the community, rather than the most prudish or the most tolerant. *Hamling* v. *United States, supra; Miller* v. *California, supra; Roth* v. *United States,* 354 U. S. 476 (1957). Both of these substantive limitations are passed on to the jury in the form of instructions.

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[10] The language of § 1461 gives no indication that Congress intended to adopt state laws relating to distribution of obscene material for purposes of the federal statute, nor does its history. See n. 12, *infra.* Furthermore, none of the usual reasons advanced in favor of such adoption are present here. The regulation of the mails is a matter of particular federal concern, and the nationwide character of the postal system argues in favor of a nationally uniform construction of § 1461. The Constitution itself recognizes this fact, in the specific grant to Congress of power over the postal system. Art. I, § 8, cl. 7. Obscenity in general has been a matter of both national and local concern. To the extent that local concern is relevant, however, the jurors' application of contemporary community standards fully satisfies that interest. Finally, to the extent that the state law and the federal law conflict, traditional principles of federal supremacy require us to follow the federal policy. See *Clearfield Trust Co.* v. *United States,* 318 U. S. 363 (1943); *United States* v. *Standard Oil Co.,* 332 U. S. 301 (1947); *DeSylva* v. *Ballentine,* 351 U. S. 570 (1956); *United States* v. *Little Lake Misere Land Co.,* 412 U. S. 580 (1973). See generally Comment, Adopting State Law as the Federal Rule of Decision: A Proposed Test, 43 U. Chi. L. Rev. 823 (1976). We therefore decline petitioner's invitation to adopt state law relating to distribution for purposes of the federal statute regulating use of the mails.

[11] It is to be noted that *Miller* held only that the States could not be compelled to adopt a national standard. 413 U. S., at 30. If a state legislature decided that it wanted a national community standard for purposes of instructing state juries, or if Congress amended the federal legislation in such a way as to require reference to a national standard, a different question would be presented. We express no view upon any such question.

The fact that the mailings in this case were wholly intrastate is immaterial for a prosecution under § 1461. That statute was one enacted under Congress' postal power, granted in Art. I, § 8, cl. 7, of the Constitution, and the Postal Power Clause does not distinguish between interstate and intrastate matters. This Court consistently has upheld Congress' exercise of that power to exclude from the mails materials that are judged to be obscene. See, *e. g., Ex parte Jackson*, 96 U. S. 727, 736 (1878); *Public Clearing House* v. *Coyne*, 194 U. S. 497, 507–508 (1904) (power to exclude from the mail "information of a character calculated to debauch the public morality"); *Roth* v. *United States, supra; United States* v. *Reidel*, 402 U. S. 351 (1971). See also *In re Rapier*, 143 U. S. 110 (1892).[12]

Our decision that contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community does not mean, as has been suggested, that obscenity convictions will be virtually unreviewable. We have stressed before that juries must be instructed properly, so that they consider the entire community and not simply their own subjective reactions, or the reactions of a sensitive or of a callous minority. See *Miller* v. *California*, 413 U. S., at 30. The type of conduct depicted must fall within the substantive limitations suggested in *Miller* and adopted in *Hamling* with respect to § 1461. Cf. *Jenkins* v. *Georgia*, 418 U. S. 153 (1974). The work also must lack serious literary, artistic, political, or scientific value before a conviction will be upheld; this determination is particularly amenable to appellate review. Finally, it

[12] For a detailed summary of the history of § 1461, see generally *Manual Enterprises, Inc.* v. *Day*, 370 U. S., at 500–511 (opinion of BRENNAN, J.); Cairns, Paul, & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009, 1010–1011, n. 2 (1962); Paul, The Post Office and Non-Mailability of Obscenity: An Historical Note, 8 UCLA L. Rev. 44 (1961); Schauer, *supra*, n. 6, at 8–29.

is always appropriate for the appellate court to review the sufficiency of the evidence. Cf. *Ginzburg* v. *United States*, 383 U. S. 463 (1966).

Petitioner argues that a decision to ignore the Iowa law will have the practical effect of nullifying that law. We do not agree. In the first place, the significance of Iowa's decision in 1974 not to regulate the distribution of obscene materials to adults is open to question. Iowa may have decided that the resources of its prosecutors' offices should be devoted to matters deemed to have greater priority than the enforcement of obscenity statutes. Such a decision would not mean that Iowa affirmatively desired free distribution of those materials; on the contrary, it would be consistent with a hope or expectation on the State's part that the Federal Government's prosecutions under statutes such as § 1461 would be sufficient for the State's purposes. The State might also view distribution over the counter as different from distribution through the mails. It might conclude that it is easier to keep obscene materials out of the hands of minors and unconsenting adults in retail establishments than it is when a letter or package arrives at a private residence. Furthermore, the history of the Iowa law suggests that the State may have left distribution to consenting adults unregulated simply because it was not then able to arrive at a compromise statute for the regulation of obscenity.

Arguments similar to petitioner's "nullification" thesis were made in cases that followed *Stanley* v. *Georgia*, 394 U. S. 557 (1969). In *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123 (1973), the question was whether the United States constitutionally might prohibit the importation of obscene material that was intended solely for private, personal use and possession. See 19 U. S. C. § 1305 (a). *Stanley* had upheld the individual's right to possess obscene material in the home, and the argument was made that this right would be virtually meaningless if the Government could prevent impor-

tation of, and hence access to, the obscene material. 413 U. S., at 126–127. The Court held that *Stanley* had been based on the privacy of the home, and that it represented a considered line of demarcation in the obscenity area. *Id.*, at 127. Consequently, despite the incidental effect that the importation prohibition had on the privacy right to possess obscene material in the home, the Court upheld the statute. A similar result was reached, in the face of similar argument, in *United States* v. *Orito*, 413 U. S. 139 (1973). There, 18 U. S. C. § 1462, the statute prohibiting knowing transportation of obscene material in interstate commerce, was at issue. The Court held that *Stanley* did not create a right to receive, transport, or distribute obscene material, even though it had established the right to possess the material in the privacy of the home. 413 U. S., at 141. See also *United States* v. *Reidel*, *supra*.

In this case, petitioner argues that the Court has recognized the right of States to adopt a laissez-faire attitude toward regulation of pornography, and that a holding that § 1461 permits a federal prosecution will render the States' right meaningless. See *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 64 (1973); *United States* v. *Reidel*, 402 U. S., at 357. Just as the individual's right to possess obscene material in the privacy of his home, however, did not create a correlative right to receive, transport, or distribute the material, the State's right to abolish all regulation of obscene material does not create a correlative right to force the Federal Government to allow the mails or the channels of interstate or foreign commerce to be used for the purpose of sending obscene material into the permissive State.

Even though the State's law is not conclusive with regard to the attitudes of the local community on obscenity, nothing we have said is designed to imply that the Iowa statute should not have been introduced into evidence at petitioner's trial. On the contrary, the local statute on obscenity provides rele-

vant evidence of the mores of the community whose legislative body enacted the law. It is quite appropriate, therefore, for the jury to be told of the law and to give such weight to the expression of the State's policy on distribution as the jury feels it deserves. We hold only that the Iowa statute is not conclusive as to the issues of contemporary community standards for appeal to the prurient interest and patent offensiveness. Those are questions for the jury to decide, in its traditional role as factfinder. *United States* v. *Danley*, 523 F. 2d 369 (CA9 1975), cert. denied, 424 U. S. 929 (1976).

V

A. We also reject petitioner's arguments that the prospective jurors should have been asked about their understanding of Iowa's community standards and Iowa law, and that § 1461 was unconstitutionally vague as applied to him. The particular inquiries requested by petitioner would not have elicited useful information about the jurors' qualifications to apply contemporary community standards in an objective way. A request for the jurors' description of their understanding of community standards would have been no more appropriate than a request for a description of the meaning of "reasonableness." Neither term lends itself to precise definition. This is not to preclude other more specific and less conclusory questions for *voir dire*. For example, it might be helpful to know how long a juror has been a member of the community, how heavily the juror has been involved in the community, and with what organizations having an interest in the regulation of obscenity the juror has been affiliated. The propriety of a particular question is a decision for the trial court to make in the first instance. In this case, however, we cannot say that the District Court abused its discretion in refusing to ask the specific questions tendered by petitioner.

B. Neither do we find § 1461 unconstitutionally vague as applied here. Our construction of the statute flows directly

from the decisions in *Hamling, Miller, Reidel,* and *Roth.* As construed in *Hamling,* the type of conduct covered by the statute can be ascertained with sufficient ease to avoid due process pitfalls. Similarly, the possibility that different juries might reach different conclusions as to the same material does not render the statute unconstitutional. *Roth* v. *United States,* 354 U. S., at 492 n. 30; *Miller* v. *California,* 413 U. S., at 26 n. 9. We find no vagueness defect in the statute attributable to the fact that federal policy with regard to distribution of obscene material through the mail was different from Iowa policy with regard to the intrastate sale of like material.

VI

Since the Iowa law on obscenity was introduced into evidence, and the jurors were told that they could consider it as evidence of the community standard, petitioner received everything to which he was entitled. To go further, and to make the state law conclusive on the issues of appeal to prurient interest and patent offensiveness, in a federal prosecution under § 1461, would be inconsistent with our prior cases. We hold that those issues are fact questions for the jury, to be judged in light of the jurors' understanding of contemporary community standards. We also hold that § 1461 is not unconstitutionally vague as so applied, and that petitioner's proposed *voir dire* questions were not improperly refused.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

MR. JUSTICE POWELL, concurring.

I join the Court's opinion and write to express my understanding of the relative narrowness of the questions presented.

At the time petitioner engaged in the conduct at issue here, Iowa law placed no limits on the distribution of obscene materials to adults. If Iowa law governs in this federal

prosecution, petitioner's conviction must be reversed. Our decision therefore turns on the answers to two questions, one requiring interpretation of a federal statute, the other calling for application of the constitutional standards announced in *Miller* v. *California*, 413 U. S. 15 (1973).

The first question, easily answered, is whether Congress intended to incorporate state obscenity statutes into 18 U. S. C. § 1461. I agree with the Court's opinion, *ante*, at 303–304, and n. 10, that no such intent existed.

The federal statute goes to the constitutional limit, reaching all pornographic materials not protected under the First Amendment. See *Marks* v. *United States*, 430 U. S. 188, 195 (1977). Under *Miller* local community standards play an important role in defining that limit. The second question, therefore, is whether "community standards," as that concept is used in *Miller*, necessarily follow changes in a State's statutory law. Again, I agree with the Court's conclusion that they do not. A community may still judge that materials are patently offensive and that they appeal to the prurient interest even though its legislature has chosen, for whatever reason, not to apply state criminal sanctions to those who distribute them. The state statute is relevant evidence of evolving community standards, and it was properly brought to the attention of the jury here. But it is not controlling in a prosecution under federal law.

I emphasize, however, that this case presents no question concerning the limits on a State's power to design its obscenity statutes as it sees fit or to define community standards as it chooses for purposes of applying *its own* laws. Within the boundaries staked out by *Miller*, the States retain broad latitude in this respect.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted after a jury trial in the United States District Court for the Southern District of Iowa of

mailing obscene material in violation of 18 U. S. C. § 1461. The Court of Appeals for the Eighth Circuit affirmed.

I would reverse. I have previously stated my view that this statute is " 'clearly overbroad and unconstitutional on its face,' " see, *e. g.*, *Millican* v. *United States*, 418 U. S. 947, 948 (1974) (dissenting from denial of certiorari), quoting *United States* v. *Orito*, 413 U. S. 139, 148 (1973) (dissenting opinion).

MR. JUSTICE STEVENS, dissenting.

Petitioner has been sentenced to prison for violating a federal statute enacted in 1873.[1] In response to a request, he mailed certain pictures and writings from one place in Iowa to another. The transaction itself offended no one [2] and violated no Iowa law. Nevertheless, because the materials proved "offensive" to third parties who were not intended to see them, a federal crime was committed.

Although the Court's affirmance of this conviction represents a logical extension of recent developments in this area of the law, it sharply points up the need for a principled re-examination of the premises on which it rests. Because so much has already been written in this area, I shall merely endeavor to identify certain weaknesses in the Court's "offensiveness" touchstone [3] and then to explain why I believe

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[1] 17 Stat. 598, 18 U. S. C. § 1461. The statute "was passed with less than an hour of Congressional debate, and there was no objection to its enactment in either the House or the Senate. Reflecting its origin, the law is still known as the Comstock Act." F. Schauer, The Law of Obscenity 13 (1976).

[2] It is, of course, possible that the postal inspectors, who had used fictitious names to request the materials, were offended by them. There was, however, no such testimony. Moreover, persons examining materials of this kind as a part of their routine duties must surely develop an insensitivity to them.

[3] Although appeal to the "prurient" interest and "patently offensive" character are identified as separate parts of the legal standard for determining whether materials are obscene, the two concepts overlap to some extent. But whether or not the two standards are different, sexually

criminal prosecutions are an unacceptable method of abating a public nuisance which is entitled to at least a modicum of First Amendment protection.

I

A federal statute defining a criminal offense should prescribe a uniform standard applicable throughout the country. This proposition is so obvious that it was not even questioned during the first 90 years of enforcement of the Comstock Act under which petitioner was prosecuted.[4] When the reach of the statute is limited by a constitutional provision, it is even more certain that national uniformity is appropriate.[5] Nevertheless, in 1963, when Mr. Chief Justice Warren concluded that

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oriented material is constitutionally protected if it is not patently offensive.

[4] In 1962, Mr. Justice Harlan wrote:

"There must first be decided the relevant 'community' in terms of whose standards of decency the issue must be judged. We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency. We need not decide whether Congress could constitutionally prescribe a lesser geographical framework for judging this issue which would not have the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency." *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 488 (footnote omitted).

[5] As MR. JUSTICE BRENNAN has written:

"It is true that local communities throughout the land are in fact diverse, and that in cases such as this one the Court is confronted with the task of reconciling the rights of such communities with the rights of individuals. Communities vary, however, in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard for application of the Federal Constitution. The Court has regularly been compelled, in reviewing criminal convictions challenged under the Due Process Clause of the Fourteenth Amendment, to reconcile the conflicting rights of the local community which brought the prosecution and of the individual defendant. Such a task is admittedly difficult and delicate, but it is inherent in the Court's duty of determining whether a particular conviction worked

a national standard for judging obscenity was not provable, he suggested the substitution of community standards as an acceptable alternative.[6] He thereby planted the seed which eventually blossomed into holdings such as *Miller*,[7] *Hamling*,[8] and today's pronouncement that the relevant standard "is not one than can be defined legislatively." *Ante*, at 303.

The conclusion that a uniformly administered national standard is incapable of definition or administration is an insufficient reason for authorizing the federal courts to engage in ad hoc adjudication of criminal cases. Quite the contrary, it is a reason for questioning the suitability of criminal prosecution as the mechanism for regulating the distribution of erotic material.

The most significant reasons for the failure to define a national standard for obscenity apply with equal force to the use of local standards. Even the most articulate craftsman finds it easier to rely on subjective reaction rather than concrete descriptive criteria as a primary definitional source.[9] The diversity within the Nation which makes a single standard of offensiveness impossible to identify is also present within each of the so-called local communities in which litigation of this

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a deprivation of rights guaranteed by the Federal Constitution. The Court has not shrunk from discharging that duty in other areas, and we see no reason why it should do so here. The Court has explicitly refused to tolerate a result whereby 'the constitutional limits of free expression in the Nation would vary with state lines,' *Pennekamp* v. *Florida*, *supra*, 328 U. S., at 335; we see even less justification for allowing such limits to vary with town or county lines. We thus reaffirm the position taken in *Roth* to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding." *Jacobellis* v. *Ohio*, 378 U. S. 184, 194–195 (footnote omitted).

[6] *Id.*, at 200–201 (dissenting opinion).

[7] *Miller* v. *California*, 413 U. S. 15.

[8] *Hamling* v. *United States*, 418 U. S. 87.

[9] MR. JUSTICE STEWART, concurring in *Jacobellis* v. *Ohio*, *supra*, at 197, wrote that criminal prosecution in the obscenity area is constitution-

kind is prosecuted.[10] Indeed, in *Miller* itself, the jury was asked to apply the contemporary community standard of California. A more culturally diverse State of the Union hardly can exist, and yet its standard for judging obscenity was assumed to be more readily ascertainable than a national standard.

Indeed, in some ways the community standard concept is even more objectionable than a national standard. As we have seen in prior cases, the geographic boundaries of the relevant community are not easily defined, and sometimes appear to be subject to elastic adjustment to suit the needs of the

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ally limited to prosecution of "hard-core pornography." He went on to note:

"I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."

[10] The opinion in *Miller, supra,* at 30–31, assumes that jurors could more easily "draw on the standards of their community" than some "hypothetical and unascertainable 'national standar[d].'" Yet, that assumption can only relate to isolated communities where jurors are well enough acquainted with members of their community to know their private tastes and values. The assumption does not apply to most segments of our diverse, mobile, metropolitan society. For surely, the standard for a metropolitan area is just as "hypothetical and unascertainable" as any national standard. For a juror, it would be almost as hard to determine the community standard for any large urban area as it would be to determine a national standard. Metropolitan areas typically contain some commercial districts devoted to the exploitation of sex, in bookshops, adult theaters, nightclubs, or burlesque houses; a juror might have seen respectable citizens frequenting the entertainments of such areas and therefore conclude that the community standard was one of "anything goes." Another juror might predicate his standard on residential enclaves which include nothing even closely resembling an adult bookstore, and decide that such an area reflects the proper standard. Under that test, the juror would probably conclude that any magazine sold from under the local drugstore counter must be obscene because its presence on the magazine rack might offend customers. A third juror might try to apply a hybrid standard.

prosecutor.[11] Moreover, although a substantial body of evidence and decisional law concerning the content of a national standard could have evolved through its consistent use, the derivation of the relevant community standard for each of our countless communities is necessarily dependent on the perceptions of the individuals who happen to compose the jury in a given case.

The question of offensiveness to community standards, whether national or local, is not one that the average juror can be expected to answer with evenhanded consistency. The average juror may well have one reaction to sexually oriented materials in a completely private setting and an entirely different reaction in a social context. Studies have shown that an opinion held by a large majority of a group concerning a neutral and objective subject has a significant impact in distorting the perceptions of group members who would normally take a different position.[12] Since obscenity is by no means a neutral subject, and since the ascertainment of a community standard is such a subjective task, the expression of individual jurors' sentiments will inevitably influence the perceptions of other jurors, particularly those who would normally be in the minority.[13] Moreover, because the record

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[11] See *Hamling* v. *United States*, *supra*, at 142–145 (BRENNAN, J., dissenting); *United States* v. *McManus*, 535 F. 2d 460 (CA8 1976), cert. denied, 429 U. S. 1052. Edelstein & Mott, Collateral Problems in Obscenity Regulation: A Uniform Approach to Prior Restraints, Community Standards and Judgment Preclusion, 7 Seton Hall L. Rev. 543, 566–571 (1976).

[12] Rosenblatt & Rosenblatt, Six Member Juries in Criminal Cases: Legal and Psychological Considerations, 47 St. John's L. Rev. 615, 631–632 (1973); Asch, Effects of Group Pressure upon the Modification and Distortion of Judgments, reprinted in D. Cartwright, Group Dynamics 189–200 (1960).

[13] A juror might well find certain materials appealing and yet be unwilling to say so. He may assume, without necessarily being correct, that his reaction is aberrant and at odds with the prevailing community view,

never discloses the obscenity standards which the jurors actually apply, their decisions in these cases are effectively unreviewable by an appellate court.[14] In the final analysis, the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors' subjective reactions to the materials in question rather than by the predictable application of rules of law.

This conclusion is especially troubling because the same image—whether created by words, sounds, or pictures—may produce such a wide variety of reactions. As Mr. Justice Harlan noted: "[It is] often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because government officials [or jurors] cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen* v. *California*, 403 U. S. 15, 25. In my judgment, the line between communications which "offend" and those which do not is too blurred to identify criminal conduct. It is also too blurred to delimit the protections of the First Amendment.

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especially if the first members of the jury to speak indicate that they consider the material offensive. Perhaps one reason that the Comstock Act was passed unanimously, see n. 1, *supra*, is that it is much more popular to be against sin than to be tolerant of it.

[14] The introduction of evidence on the question of contemporary community standards will rarely enable an appellate judge to differentiate between the jurors' own reactions to the materials in question and the reactions of the average resident of the community. For instance, in the present case, the defendant entered into evidence as exhibits materials which were freely and lawfully available at stores in Iowa. These exhibits were more salacious, lewd, and open in their treatment of sex than were the materials upon which the defendants were convicted. Yet a reviewing court could not use this evidence to overturn a jury verdict, for the jury's view may quite correctly have been that these materials, although freely available, were appreciated only by a deviant minority of the community and did not conform to the community standard. Testimony of experts would have to be similarly discounted.

II

Although the variable nature of a standard dependent on local community attitudes is critically defective when used to define a federal crime, that very flexibility is a desirable feature of a civil rule designed to protect the individual's right to select the kind of environment in which he wants to live.

In his dissent in *Jacobellis* v. *Ohio*, 378 U. S. 184, Mr. Chief Justice Warren reminded us that obscene material "may be proscribed in a number of ways," *id.*, at 201, and that a lesser standard of review is required in civil cases than in criminal. Moreover, he identified a third dimension in the obscenity determination that is ignored in the Court's current formulation of the standard:

> "In my opinion, the use to which various materials are put—not just the words and pictures themselves—must be considered in determining whether or not the materials are obscene. A technical or legal treatise on pornography may well be inoffensive under most circumstances but, at the same time, 'obscene' in the extreme when sold or displayed to children." *Ibid.* (footnote omitted).

The standard now applied by the Court focuses its attention on the content of the materials and their impact on the average person in the community. But that impact is not a constant; it may vary widely with the use to which the materials are put. As Mr. Justice Sutherland wrote in a different context, a "nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." [15] Whether a pig or a picture is offensive is a question that cannot be answered in the abstract.

In *Roth* v. *United States*, 354 U. S. 476, 485, the Court held "that obscenity is not within the area of constitutionally protected speech or press." That holding rests, in part, on

[15] *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388.

the assumed premise that all communications within the protected area are equally immune from governmental restraint, whereas those outside that area are utterly without social value and, hence, deserving of no protection. Last Term the Court expressly rejected that premise. *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 66–71; *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 771–773. The fact that speech is protected by the First Amendment does not mean that it is wholly immune from state regulation. Although offensive or misleading statements in a political oration cannot be censored, offensive language in a courtroom [16] or misleading representations in a securities prospectus may surely be regulated. Nuisances such as sound trucks [17] and erotic displays in a residential area may be abated under appropriately flexible civil standards even though the First Amendment provides a shield against criminal prosecution.

As long as the government does not totally suppress protected speech and is faithful to its paramount obligation of complete neutrality with respect to the point of view expressed in a protected communication, I see no reason why regulation of certain types of communication may not take into account obvious differences in subject matter. See *Lehman* v. *City of Shaker Heights*, 418 U. S. 298. It seems to me ridiculous to assume that no regulation of the display of sexually oriented material is permissible unless the same regula-

[16] In deciding what comments on litigation may be punished, the content of the comment, whether it is uttered inside or outside the courtroom, and whether it concerns pending litigation, all have relevance. See *In re Little*, 404 U. S. 553; *Pennekamp* v. *Florida*, 328 U. S. 331; *Bridges* v. *California*, 314 U. S. 252. See also *In re Dellinger*, 502 F. 2d 813, 815 (CA7 1974), cert. denied *sub nom. Dellinger* v. *United States*, 420 U. S. 990; *Theriault* v. *United States*, 481 F. 2d 1193, 1196 (CA5 1973), cert. denied, 414 U. S. 1114. Such factors are always relevant in applying the clear-and-present-danger test: Only the combination of content (the word "fire") and place (a crowded theater) allows prohibition in Mr. Justice Holmes' famous example, *Schenck* v. *United States*, 249 U. S. 47, 52.

[17] See *Saia* v. *New York*, 334 U. S. 558; *Kovacs* v. *Cooper*, 336 U. S. 77.

tion could be applied to political comment.[18] On the other hand, I am not prepared to rely on either the average citizen's understanding of an amorphous community standard or on my fellow judges' appraisal of what has serious artistic merit as a basis for deciding what one citizen may communicate to another by appropriate means.[19]

I do not know whether the ugly[20] pictures in this record have any beneficial value. The fact that there is a large demand for comparable materials indicates that they do pro-

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[18] This assumption must underlie the suggestion in *Miller* that a national standard would require that "the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." 413 U. S., at 32 (footnote omitted). That suggestion misreads the First Amendment in at least two ways. The constitutional protection of the speaker's right to communicate does not deprive the local community of all authority to regulate the time, place, and manner of communication; Nevada's approval of public displays would not necessarily require Maine or Mississippi to approve use of identical means of expression. More fundamentally, the constitutional inquiry is not confined to the question of what an unwilling recipient must accept; rather, the critical First Amendment question in this kind of case involves the interested individual's right of access to materials he desires. See the passage from *Kleindienst* v. *Mandel*, 408 U. S. 753, 762–763, quoted in *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748, 757, which recognizes that the First Amendment necessarily protects the right to "receive information and ideas."

[19] As Mr. Justice Douglas once noted: "The First Amendment makes confidence in the common sense of our people and in their maturity of judgment the great postulate of our democracy." *Dennis* v. *United States*, 341 U. S. 494, 590 (dissenting opinion).

[20] If First Amendment protection is properly denied to materials that are "patently offensive" to the average citizen, I question whether the element of erotic appeal is of critical importance. For the average person may find some portrayals of violence, of disease, or of intimate bodily functions (such as the birth of a child) equally offensive—at least when they are viewed for the first time. It is noteworthy that one of the examples of an unprotected representation identified by the Court, *ante*, at 301 n. 8, surely would have no erotic appeal to the average person.

vide amusement or information, or at least satisfy the curiosity of interested persons.[21] Moreover, there are serious well-intentioned people who are persuaded that they serve a worthwhile purpose.[22] Others believe they arouse passions that lead to the commission of crimes; if that be true, surely there is a mountain of material just within the protected zone that is equally capable of motivating comparable conduct.[23] Moreover, the dire predictions about the baneful effects of these

[21] As Mr. Justice Harlan wrote in *Cohen* v. *California*, 403 U. S. 15, 25–26:

"Additionally, we cannot overlook the fact . . . that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."

To a similar effect, this Court wrote in *Winters* v. *New York*, 333 U. S. 507, 510:

"We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."

[22] See the Final Report of the President's Commission on Obscenity and Pornography (1970).

[23] Anthony Comstock, who is given credit for the enactment of the statute involved in this case, understood this point. He wrote: " 'No embellishment of art can rob lust of its power for evil upon the human nature,' " J. Kilpatrick, The Smut Peddlers 42 (1960). According to Professor Schauer "[a]mong the objects of Comstock's scorn were light literature, pool halls, lotteries, gambling dens, popular magazines, and weekly newspapers. Artistic motive was irrelevant." The Law of Obscenity 12 n. 51 (1976).

materials are disturbingly reminiscent of arguments formerly made about the availability of what are now valued as works of art. In the end, I believe we must rely on the capacity of the free marketplace of ideas to distinguish that which is useful or beautiful from that which is ugly or worthless.[24]

In this case the petitioner's communications were intended to offend no one. He could hardly anticipate that they would offend the person who requested them. And delivery in sealed envelopes prevented any offense to unwilling third parties. Since his acts did not even constitute a nuisance, it necessarily follows, in my opinion, that they cannot provide the basis for a criminal prosecution.

I respectfully dissent.

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[24] Mr. Justice Holmes has written:

"[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution." *Abrams* v. *United States*, 250 U. S. 616, 630 (dissenting opinion).

MASSACHUSETTS *v.* WESTCOTT

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 75-1775. Argued January 17, 1977—Decided May 23, 1977

Where it appears that there may be a statutory basis for providing relief to respondent owner of a federally enrolled and licensed fishing vessel against enforcement of a Massachusetts statute prohibiting nonresidents from dragging for fish by beam or otter trawl in Vineyard Sound during certain months, *Douglas* v. *Seacoast Products, Inc.*, *ante*, p. 265, this Court will not decide the question presented as to the constitutionality of the statute.

344 N. E. 2d 411, vacated and remanded.

PER CURIAM.

Respondent Westcott was arrested for violating a Massachusetts statute that prohibits nonresidents of the Commonwealth of Massachusetts from dragging for fish by beam or otter trawl in Vineyard Sound during July, August, and September.[1] After he was found guilty, he pursued his right to *de novo* review and filed a motion to dismiss the complaint. The Massachusetts Supreme Judicial Court granted direct appellate review and ordered the complaint dismissed on the ground that the statute violated the Privileges and Immunities Clause

[1] The Act of Feb. 20, 1923, c. 35, 1923 Mass. Acts 17, as amended by the Act of Mar. 13, 1962, c. 219, 1962 Mass. Acts 107:

"It shall be unlawful during the months of July, August and September for any person who has not been a legal resident of this commonwealth during the preceding year to use beam or otter trawls to drag for fish in that part of the waters of Vineyard Sound lying in the towns of Chilmark, Gay Head and Gosnold, and included between an imaginary line running from the extreme western point of Gay Head to the extreme western point of Nashawena island and another imaginary line running from Cape Higgon to Tarpaulin Cove Light. Violation of this act shall be punished by a fine of not less than five hundred nor more than one thousand dollars."

of the United States Constitution, Art. IV, § 3, cl. 2. 344 N. E. 2d 411. We granted certiorari. 429 U. S. 815 (1976).

Our decision today in *Douglas* v. *Seacoast Products, Inc.*, *ante*, p. 265, suggests that there may be a statutory basis to provide respondent the relief he seeks, thereby making it unnecessary to decide the constitutional question presented. *Douglas* holds that federal law pre-empts the States from denying vessels that are federally enrolled and licensed for the fisheries the right to fish in state waters on the same terms as state residents. Respondent's vessel is federally enrolled and licensed "to be employed in carrying on the mackerel fishery," the same license that was held by appellees in *Douglas*.[2] In accordance with our longstanding principle of deciding constitutional questions only when necessary, *Hagans* v. *Lavine*, 415 U. S. 528, 543 (1974); *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring), we decline to decide the privileges and immunities question presented in this case, and vacate the judgment and remand the case for further consideration in light of *Douglas*. See *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430 (1940).

It is so ordered.

JUSTICE REHNQUIST concurs in the judgment on the authority of *Douglas* v. *Seacoast Products, Inc.*, *ante*, p. 265.

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[2] The fact that respondent holds such a license has been ascertained from the records of the Merchant Vessel Documentation Division of the Coast Guard. These records may be judicially noticed. See, *e. g.*, *Bowles* v. *United States*, 319 U. S. 33 (1943); *Tempel* v. *United States*, 248 U. S. 121 (1918); *Jones* v. *United States*, 137 U. S. 202 (1890); cf. Fed. Rule Evid. 201 (b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). The parties were given an opportunity to comment on the propriety of our taking notice of the license, and both sides agreed that we could properly do so. See supplemental briefs filed by the parties.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-636. Argued January 10, 1977—Decided May 31, 1977*

The United States instituted this litigation under Title VII of the Civil Rights Act of 1964 against petitioners, a nationwide common carrier of motor freight, and a union representing a large group of the company's employees. The Government alleged that the company had engaged in a pattern or practice of discriminating against Negroes and Spanish-surnamed persons (hereinafter sometimes collectively "minority members") who were hired as servicemen or local city drivers, which were lower paying, less desirable jobs than the positions of line drivers (over-the-road, long-distance drivers), which went to whites, and that the seniority system in the collective-bargaining agreements between petitioners perpetuated ("locked in") the effects of past racial and ethnic discrimination because under that system a city driver or serviceman who transferred to a line-driver job had to forfeit all the competitive seniority he had accumulated in his previous bargaining unit and start at the bottom of the line drivers' "board." The Government sought a general injunctive remedy and specific "make whole" relief for individual discriminatees, which would allow them an opportunity to transfer to line-driver jobs with full company seniority. Section 703 (a) of Title VII makes it an unlawful employment practice, *inter alia*, for an employer to fail or refuse to hire any individual or otherwise discriminate against him with regard to his employment because of his race or national origin. Section 703 (h) provides in part that notwithstanding other provisions, it shall not be an unlawful employment practice for an employer to apply different employment standards "pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate . . . ." The District Court after trial, with respect to both the employment discrimination and the seniority system in the collective-bargaining agreements, held that petitioners had violated Title VII and enjoined both the company and the union from committing further violations thereof. With respect to individual relief, the court determined that

*Together with No. 75-672, *T. I. M. E.-D. C., Inc.* v. *United States et al.*, also on certiorari to the same court.

the "affected class" of discriminatees included all minority members who had been hired as city drivers or servicemen at every company terminal with a line-driver operation, whether they were hired before or after Title VII's effective date. The discriminatees thereby became entitled to preference over all other line-driver applicants in the future. Finding that members of the affected class had been injured in varying degrees, the court created three subclasses, and applied to each a different formula for filling line-driver jobs and for establishment of seniority, giving retroactive seniority to the effective date of the Act to those who suffered "severe injury." The right of any class member to a line-driver vacancy was made subject to the prior recall rights under the collective-bargaining agreement of line drivers who had been on layoff for not more than three years. Although agreeing with the District Court's basic conclusions, the Court of Appeals rejected the affected-class trisection, holding that the minority members could bid for future line-driver jobs on the basis of their company seniority and that once a class member became a line driver he could use his full company seniority even if it antedated Title VII's effective date, limited only by a "qualification date" formula, under which seniority could not be awarded for periods prior to the date when (1) a line-driver job was vacant, and (2) the class member met (or, given the opportunity, would have met) the line-driver qualifications. Holding that the three-year priority in favor of laid-off workers "would unduly impede the eradication of past discrimination," the Court of Appeals directed that when a not purely temporary line-driver vacancy arose a class member might compete against any line driver on layoff on the basis of the member's retroactive seniority. *Held:*

1. The Government sustained its burden of proving that the company engaged in a systemwide pattern or practice of employment discrimination against minority members in violation of Title VII by regularly and purposefully treating such members less favorably than white persons. The evidence, showing pervasive statistical disparities in line-driver positions between employment of the minority members and whites, and bolstered by considerable testimony of specific instances of discrimination, was not adequately rebutted by the company and supported the findings of the courts below. Pp. 334–343.

2. Since the Government proved that the company engaged in a post-Act pattern of discriminatory employment policies, retroactive seniority may be awarded as relief for post-Act discriminatees even if the seniority system agreement makes no provision for such relief. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 778–779. Pp. 347–348.

3. The seniority system was protected by § 703 (h) and therefore the union's conduct in agreeing to and maintaining the system did not violate Title VII. Employees who suffered only pre-Act discrimination are not entitled to relief, and no person may be given retroactive seniority to a date earlier than the Act's effective date. The District Court's injunction against the union must consequently be vacated. Pp. 348–356.

(a) By virtue of § 703 (h) a bona fide seniority system does not become unlawful simply because it may perpetuate pre-Title VII discrimination, for Congress (as is manifest from the language and legislative history of the Act) did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees. Thus here because of the company's intentional pre-Act discrimination the disproportionate advantage given by the seniority system to the white line drivers with the longest tenure over the minority member employees who might by now have enjoyed those advantages were it not for the pre-Act discrimination is sanctioned by § 703 (h). Pp. 348–355.

(b) The seniority system at issue here is entirely bona fide, applying to all races and ethnic groups, and was negotiated and is maintained free from any discriminatory purpose. Pp. 355–356.

4. Every post-Act minority member applicant for a line-driver position is presumptively entitled to relief, subject to a showing by the company that its earlier refusal to place the applicant in a line-driver job was not based on its policy of discrimination. Cf. *Franks, supra*, at 773 n. 32. Pp. 357–362.

5. An incumbent employee's failure to apply for a job does not inexorably bar an award of retroactive seniority, and individual nonapplicants must be afforded an opportunity to undertake their difficult task of proving that they should be treated as applicants and therefore are presumptively entitled to relief accordingly. Pp. 362–371.

(a) Congress' purpose in vesting broad equitable powers in Title VII courts was "to make possible the 'fashion[ing] [of] the most complete relief possible,'" *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 421. Measured against the broad prophylactic purposes of Title VII, the company's assertion that a person who has not actually applied for a job can never be awarded seniority relief cannot prevail, for a consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection. Pp. 364–367.

(b) However, a nonapplicant must still show that he was a potential

victim of unlawful discrimination and that he would have applied for a line-driver job but for the company's discriminatory practices. The known prospect of discriminatory rejection shows only that employees who wanted line-driving jobs may have been deterred from applying for them but does not show which of the nonapplicants actually wanted such jobs or were qualified. Consequently, the Government has the burden of proving at a remedial hearing to be conducted by the District Court which specific nonapplicants would have applied for line-driver jobs but for their knowledge of the company's discriminatory policies. Pp. 367–371.

6. At such hearing on remand the District Court will have to identify which of the minority members were actual victims of discrimination and, by application of the basic principles of equity, to balance their interest against the legitimate expectations of other employees innocent of wrongdoing. Pp. 371–376.

517 F. 2d 299, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. MARSHALL, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, J., joined, *post*, p. 377.

L. N. D. Wells, Jr., argued the cause for petitioner in No. 75–636. With him on the briefs were *David Previant* and *G. William Baab*. *Robert D. Shuler* argued the cause for petitioner in No. 75–672. With him on the brief was *John W. Ester*.

Deputy Solicitor General Wallace argued the cause for the United States et al. in both cases. With him on the brief were *Solicitor General Bork, Assistant Attorney General Pottinger, Thomas S. Martin, Brian K. Landsberg, David L. Rose, William B. Fenton, Jessica Dunsay Silver*, and *Abner W. Sibal*.†

†*Jack Greenberg, O. Peter Sherwood, Barry L. Goldstein*, and *Eric Schnapper* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Michael A. Warner, Robert E. Williams*, and *Douglas S. McDowell* for the Equal Employment Advisory Council; and by *W. Walton Garrett* for the Over the Road Drivers Assn., Inc.

MR. JUSTICE STEWART delivered the opinion of the Court.

This litigation brings here several important questions under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. V). The issues grow out of alleged unlawful employment practices engaged in by an employer and a union. The employer is a common carrier of motor freight with nationwide operations, and the union represents a large group of its employees. The District Court and the Court of Appeals held that the employer had violated Title VII by engaging in a pattern and practice of employment discrimination against Negroes and Spanish-surnamed Americans, and that the union had violated the Act by agreeing with the employer to create and maintain a seniority system that perpetuated the effects of past racial and ethnic discrimination. In addition to the basic questions presented by these two rulings, other subsidiary issues must be resolved if violations of Title VII occurred—issues concerning the nature of the relief to which aggrieved individuals may be entitled.

I

The United States brought an action in a Tennessee federal court against the petitioner T. I. M. E.-D. C., Inc. (company), pursuant to § 707 (a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–6 (a).[1] The complaint charged that the

[1] At the time of suit the statute provided as follows:

"(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or

company had followed discriminatory hiring, assignment, and promotion policies against Negroes at its terminal in Nashville, Tenn.[2] The Government brought a second action against the company almost three years later in a Federal District Court in Texas, charging a pattern and practice of employment discrimination against Negroes and Spanish-surnamed persons throughout the company's transportation system. The petitioner International Brotherhood of Teamsters (union) was joined as a defendant in that suit. The two actions were consolidated for trial in the Northern District of Texas.

The central claim in both lawsuits was that the company had engaged in a pattern or practice of discriminating against minorities in hiring so-called line drivers. Those Negroes and Spanish-surnamed persons who had been hired, the Government alleged, were given lower paying, less desirable jobs as servicemen or local city drivers, and were thereafter discriminated against with respect to promotions and transfers.[3] In

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practice, as he deems necessary to insure the full enjoyment of the rights herein described."

Section 707 was amended by § 5 of the Equal Employment Opportunity Act of 1972, 86 Stat. 107, 42 U. S. C. § 2000e–6 (c) (1970 ed., Supp. V), to give the Equal Employment Opportunity Commission, rather than the Attorney General, the authority to bring "pattern or practice" suits under that section against private-sector employers. In 1974, an order was entered in this action substituting the EEOC for the United States but retaining the United States as a party for purposes of jurisdiction, appealability, and related matters. See 42 U. S. C. § 2000e–6 (d) (1970 ed., Supp. V).

[2] The named defendant in this suit was T. I. M. E. Freight, Inc., a predecessor of T. I. M. E.-D. C., Inc. T. I. M. E.-D. C., Inc., is a nationwide system produced by 10 mergers over a 17-year period. See *United States* v. *T. I. M. E.-D. C., Inc.*, 517 F. 2d 299, 304, and n. 6 (CA5). It currently has 51 terminals and operates in 26 States and three Canadian Provinces.

[3] *Line drivers*, also known as over-the-road drivers, engage in long-distance hauling between company terminals. They compose a separate bargaining unit at the company. Other distinct bargaining units include

this connection the complaint also challenged the seniority system established by the collective-bargaining agreements between the employer and the union. The Government sought a general injunctive remedy and specific "make whole" relief for all individual discriminatees, which would allow them an opportunity to transfer to line-driver jobs with full company seniority for all purposes.

The cases went to trial [4] and the District Court found that

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servicemen, who service trucks, unhook tractors and trailers, and perform similar tasks; and *city operations*, composed of dockmen, hostlers, and city drivers who pick up and deliver freight within the immediate area of a particular terminal. All of these employees were represented by the petitioner union.

[4] Following the receipt of evidence, but before decision, the Government and the company consented to the entry of a Decree in Partial Resolution of Suit. The consent decree did not constitute an adjudication on the merits. The company agreed, however, to undertake a minority recruiting program; to accept applications from all Negroes and Spanish-surnamed Americans who inquired about employment, whether or not vacancies existed, and to keep such applications on file and notify applicants of job openings; to keep specific employment and recruiting records open to inspection by the Government and to submit quarterly reports to the District Court; and to adhere to certain uniform employment qualifications respecting hiring and promotion to line driver and other jobs.

The decree further provided that future job vacancies at any company terminal would be filled first "[b]y those persons who may be found by the Court, if any, to be individual or class discriminatees suffering the present effects of past discrimination because of race or national origin prohibited by Title VII of the Civil Rights Act of 1964." Any remaining vacancies could be filled by "any other persons," but the company obligated itself to hire one Negro or Spanish-surnamed person for every white person hired at any terminal until the percentage of minority workers at that terminal equaled the percentage of minority group members in the population of the metropolitan area surrounding the terminal. Finally, the company agreed to pay $89,500 in full settlement of any backpay obligations. Of this sum, individual payments not exceeding $1,500 were to be paid to "alleged individual and class discriminatees" identified by the Government.

The Decree in Partial Resolution of Suit narrowed the scope of the litigation, but the District Court still had to determine whether unlawful

the Government had shown "by a preponderance of the evidence that T. I. M. E.-D. C. and its predecessor companies were engaged in a plan and practice of discrimination in violation of Title VII . . . ." [5] The court further found that the seniority system contained in the collective-bargaining contracts between the company and the union violated Title VII because it "operate[d] to impede the free transfer of minority groups into and within the company." Both the company and the union were enjoined from committing further violations of Title VII.

With respect to individual relief the court accepted the Government's basic contention that the "affected class" of discriminatees included all Negro and Spanish-surnamed incumbent employees who had been hired to fill city operations or serviceman jobs at every terminal that had a line-driver operation.[6] All of these employees, whether hired before or after the effective date of Title VII, thereby became entitled to preference over all other applicants with respect to consideration for future vacancies in line-driver jobs.[7] Finding that members of the affected class had been injured in different degrees, the court created three subclasses. Thirty persons who had produced "the most convincing evidence of discrimination and harm" were found to have suffered "severe injury." The court ordered that they be offered the opportunity to fill line-driver jobs with competitive seniority dating back to July 2,

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discrimination had occurred. If so, the court had to identify the actual discriminatees entitled to fill future job vacancies under the decree. The validity of the collective-bargaining contract's seniority system also remained for decision, as did the question whether any discriminatees should be awarded additional equitable relief such as retroactive seniority.

[5] The District Court's memorandum decision is reported at 6 FEP Cases 690 (1974) and 6 EPD ¶ 8979 (1973–1974).

[6] The Government did not seek relief for Negroes and Spanish-surnamed Americans hired at a particular terminal after the date on which that terminal first employed a minority group member as a line driver.

[7] See n. 4, *supra*.

1965, the effective date of Title VII.[8] A second subclass included four persons who were "very possibly the objects of discrimination" and who "were likely harmed," but as to whom there had been no specific evidence of discrimination and injury. The court decreed that these persons were entitled to fill vacancies in line-driving jobs with competitive seniority as of January 14, 1971, the date on which the Government had filed its systemwide lawsuit. Finally, there were over 300 remaining members of the affected class as to whom there was "no evidence to show that these individuals were either harmed or not harmed individually." The court ordered that they be considered for line-driver jobs[9] ahead of any applicants from the general public but behind the two other subclasses. Those in the third subclass received no retroactive seniority; their competitive seniority as line drivers would begin with the date they were hired as line drivers. The court further decreed that the right of any class member to fill a line-driver vacancy was subject to the prior recall rights of laid-off line drivers, which under the collective-bargaining agreements then in effect extended for three years.[10]

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[8] If an employee in this class had joined the company after July 2, 1965, then the date of his initial employment rather than the effective date of Title VII was to determine his competitive seniority.

[9] As with the other subclasses, there were a few individuals in the third group who were found to have been discriminated against with respect to jobs other than line driver. There is no need to discuss them separately in this opinion.

[10] This provision of the decree was qualified in one significant respect. Under the Southern Conference Area Over-the-Road Supplemental Agreement between the employer and the union, line drivers employed at terminals in certain Southern States work under a "modified" seniority system. Under the modified system an employee's seniority is not confined strictly to his home terminal. If he is laid off at his home terminal he can move to another terminal covered by the Agreement and retain his seniority, either by filling a vacancy at the other terminal or by "bumping" a junior line driver out of his job if there is no vacancy. The modified

The Court of Appeals for the Fifth Circuit agreed with the basic conclusions of the District Court: that the company had engaged in a pattern or practice of employment discrimination and that the seniority system in the collective-bargaining agreements violated Title VII as applied to victims of prior discrimination. 517 F. 2d 299. The appellate court held, however, that the relief ordered by the District Court was inadequate. Rejecting the District Court's attempt to trisect the affected class, the Court of Appeals held that all Negro and Spanish-surnamed incumbent employees were entitled to bid for future line-driver jobs on the basis of their company seniority, and that once a class member had filled a job, he could use his full company seniority—even if it predated the effective date of Title VII—for all purposes, including bidding and layoff. This award of retroactive seniority was to be limited only by a "qualification date" formula, under which seniority could not be awarded for periods prior to the date when (1) a line-driving position was vacant,[11] *and* (2) the class member met (or would have met, given the opportunity) the qualifications for employment as a line driver.[12] Finally,

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system also requires that any new vacancy at a covered terminal be offered to laid-off line drivers at all other covered terminals before it is filled by any other person. The District Court's final decree, as amended slightly by the Court of Appeals, 517 F. 2d 299, 323, altered this system by requiring that any vacancy be offered to all members of all three subclasses before it may be filled by laid-off line drivers from other terminals.

[11] Although the opinion of the Court of Appeals in this case did not specifically mention the requirement that a vacancy exist, it is clear from earlier and later opinions of that court that this requirement is a part of the Fifth Circuit's "qualification date" formula. See, *e. g.*, *Rodriguez* v. *East Texas Motor Freight*, 505 F. 2d 40, 63 n. 29, rev'd on other grounds, *post*, p. 395, cited in 517 F. 2d, at 318 n. 35; *Sagers* v. *Yellow Freight System, Inc.*, 529 F. 2d 721, 731–734.

[12] For example, if a class member began his tenure with the company on January 1, 1966, at which time he was qualified as a line driver and a line-driving vacancy existed, his competitive seniority upon becoming a line driver would date back to January 1, 1966. If he became qualified

the Court of Appeals modified that part of the District Court's decree that had subjected the rights of class members to fill future vacancies to the recall rights of laid-off employees. Holding that the three-year priority in favor of laid-off workers "would unduly impede the eradication of past discrimination," *id.*, at 322, the Court of Appeals ordered that class members be allowed to compete for vacancies with laid-off employees on the basis of the class members' retroactive seniority. Laid-off line drivers would retain their prior recall rights with respect only to "purely temporary" vacancies. *Ibid.*[13]

The Court of Appeals remanded the case to the District Court to hold the evidentiary hearings necessary to apply these remedial principles. We granted both the company's and the union's petitions for certiorari to consider the significant questions presented under the Civil Rights Act of 1964, 425 U. S. 990.

II

In this Court the company and the union contend that their conduct did not violate Title VII in any respect, asserting first that the evidence introduced at trial was insufficient to show that the company engaged in a "pattern or practice" of employment discrimination. The union further contends that the seniority system contained in the collective-bargaining agreements in no way violated Title VII. If these contentions are correct, it is unnecessary, of course, to reach any of the issues concerning remedies that so occupied the attention of the Court of Appeals.

A

Consideration of the question whether the company engaged in a pattern or practice of discriminatory hiring prac-

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or if a vacancy opened up only at a later date, then that later date would be used.

[13] The Court of Appeals also approved (with slight modification) the part of the District Court's order that allowed class members to fill

tices involves controlling legal principles that are relatively clear. The Government's theory of discrimination was simply that the company, in violation of § 703 (a) of Title VII,[14] regularly and purposefully treated Negroes and Spanish-surnamed Americans less favorably than white persons. The disparity in treatment allegedly involved the refusal to recruit, hire, transfer, or promote minority group members on an equal basis with white people, particularly with respect to line-driving positions. The ultimate factual issues are thus simply whether there was a pattern or practice of such disparate treatment and, if so, whether the differences were "racially premised." *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 805 n. 18.[15]

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vacancies at a particular terminal ahead of line drivers laid off at other terminals. See n. 10, *supra*.

[14] Section 703 (a) of Title VII, 42 U. S. C. § 2000e–2 (a) (1970 ed. and Supp. V), provides:

"(a) It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[15] "Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. See, *e. g.*, *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 265–266. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. See, *e. g.*, 110 Cong. Rec. 13088 (1964) (remarks of Sen. Humphrey) ("What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and

As the plaintiff, the Government bore the initial burden of making out a prima facie case of discrimination. *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 425; *McDonnell Douglas Corp.* v. *Green*, *supra*, at 802. And, because it alleged a systemwide pattern or practice of resistance to the full enjoyment of Title VII rights, the Government ultimately had to prove more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice.[16]

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women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States").

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. See *infra*, at 349. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. Compare, *e. g.*, *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430–432, with *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802–806. See generally B. Schlei & P. Grossman, Employment Discrimination Law 1–12 (1976); Blumrosen, Strangers in Paradise: *Griggs* v. *Duke Power Co.* and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59 (1972). Either theory may, of course, be applied to a particular set of facts.

[16] The "pattern or practice" language in § 707 (a) of Title VII, *supra*, at 328 n. 1, was not intended as a term of art, and the words reflect only their usual meaning. Senator Humphrey explained:

"[A] pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature. There would be a pattern or practice if, for example, a number of companies or persons in the same industry or line of business discriminated, if a chain of motels or restaurants practiced racial discrimination throughout all or a significant part of its system, or if a company repeatedly and regularly engaged in acts prohibited by the statute.

. . . . .

"The point is that single, insignificant, isolated acts of discrimination by

We agree with the District Court and the Court of Appeals that the Government carried its burden of proof. As of March 31, 1971, shortly after the Government filed its complaint alleging systemwide discrimination, the company had 6,472 employees. Of these, 314 (5%) were Negroes and 257 (4%) were Spanish-surnamed Americans. Of the 1,828 line drivers, however, there were only 8 (0.4%) Negroes and 5 (0.3%) Spanish-surnamed persons, and all of the Negroes had been hired after the litigation had commenced. With one exception—a man who worked as a line driver at the Chicago terminal from 1950 to 1959—the company and its predecessors *did not employ a Negro on a regular basis as a line driver until 1969.* And, as the Government showed, even in 1971 there were terminals in areas of substantial Negro population where all of the company's line drivers were white.[17] A great majority of the Negroes (83%) and Spanish-surnamed Americans

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a single business would not justify a finding of a pattern or practice . . . ." 110 Cong. Rec. 14270 (1964).

This interpretation of "pattern or practice" appears throughout the legislative history of § 707 (a), and is consistent with the understanding of the identical words as used in similar federal legislation. See 110 Cong. Rec. 12946 (1964) (remarks of Sen. Magnuson) (referring to § 206 (a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a–5); 110 Cong. Rec. 13081 (1964) (remarks of Sen. Case); *id.*, at 14239 (remarks of Sen. Humphrey); *id.*, at 15895 (remarks of Rep. Celler). See also *United States* v. *Jacksonville Terminal Co.*, 451 F. 2d 418, 438, 441 (CA5); *United States* v. *Ironworkers Local 86*, 443 F. 2d 544, 552 (CA9); *United States* v. *West Peachtree Tenth Corp.*, 437 F. 2d 221, 227 (CA5); *United States* v. *Mayton*, 335 F. 2d 153, 158–159 (CA5).

[17] In Atlanta, for instance, Negroes composed 22.35% of the population in the surrounding metropolitan area and 51.31% of the population in the city proper. The company's Atlanta terminal employed 57 line drivers. All were white. In Los Angeles, 10.84% of the greater metropolitan population and 17.88% of the city population were Negro. But at the company's two Los Angeles terminals there was not a single Negro among the 374 line drivers. The proof showed similar disparities in San Francisco, Denver, Nashville, Chicago, Dallas, and at several other terminals.

(78%) who did work for the company held the lower paying city operations and serviceman jobs,[18] whereas only 39% of the nonminority employees held jobs in those categories.

The Government bolstered its statistical evidence with the testimony of individuals who recounted over 40 specific instances of discrimination. Upon the basis of this testimony the District Court found that "[n]umerous qualified black and Spanish-surnamed American applicants who sought line driving jobs at the company over the years, either had their requests ignored, were given false or misleading information about requirements, opportunities, and application procedures, or were not considered and hired on the same basis that whites were considered and hired." Minority employees who wanted to transfer to line-driver jobs met with similar difficulties.[19]

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[18] Although line-driver jobs pay more than other jobs, and the District Court found them to be "considered the most desirable of the driving jobs," it is by no means clear that all employees, even driver employees, would prefer to be line drivers. See *infra*, at 369–370, and n. 55. Of course, Title VII provides for equal opportunity to compete for *any* job, whether it is thought better or worse than another. See, *e. g.*, *United States* v. *Hayes Int'l Corp.*, 456 F. 2d 112, 118 (CA5); *United States* v. *National Lead Co.*, 438 F. 2d 935, 939 (CA8).

[19] Two examples are illustrative:

George Taylor, a Negro, worked for the company as a city driver in Los Angeles, beginning late in 1966. In 1968, after hearing that a white city driver had transferred to a line-driver job, he told the terminal manager that he also would like to consider line driving. The manager replied that there would be "a lot of problems on the road . . . with different people, Caucasian, et cetera," and stated: "I don't feel that the company is ready for this right now. . . . Give us a little time. It will come around, you know." Mr. Taylor made similar requests some months later and got similar responses. He was never offered a line-driving job or an application.

Feliberto Trujillo worked as a dockman at the company's Denver terminal. When he applied for a line-driver job in 1967, he was told by a personnel officer that he had one strike against him. He asked what that was and was told: "You're a Chicano, and as far as we know, there isn't a Chicano driver in the system."

The company's principal response to this evidence is that statistics can never in and of themselves prove the existence of a pattern or practice of discrimination, or even establish a prima facie case shifting to the employer the burden of rebutting the inference raised by the figures. But, as even our brief summary of the evidence shows, this was not a case in which the Government relied on "statistics alone." The individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life.

In any event, our cases make it unmistakably clear that "[s]tatistical analyses have served and will continue to serve an important role" in cases in which the existence of discrimination is a disputed issue. *Mayor of Philadelphia* v. *Educational Equality League*, 415 U. S. 605, 620. See also *McDonnell Douglas Corp.* v. *Green*, 411 U. S., at 805. Cf. *Washington* v. *Davis*, 426 U. S. 229, 241–242. We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases, see, *e. g.*, *Turner* v. *Fouche*, 396 U. S. 346; *Hernandez* v. *Texas*, 347 U. S. 475; *Norris* v. *Alabama*, 294 U. S. 587. Statistics are equally competent in proving employment discrimination.[20]

[20] Petitioners argue that statistics, at least those comparing the racial composition of an employer's work force to the composition of the population at large, should never be given decisive weight in a Title VII case because to do so would conflict with § 703 (j) of the Act, 42 U. S. C. § 2000e–2 (j). That section provides:

"Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

The argument fails in this case because the statistical evidence was not

We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances. See, *e. g.*, *Hester* v. *Southern R. Co.*, 497 F. 2d 1374, 1379–1381 (CA5).

In addition to its general protest against the use of statistics in Title VII cases, the company claims that in this case the statistics revealing racial imbalance are misleading because they fail to take into account the company's particular busi-

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offered or used to support an erroneous theory that Title VII requires an employer's work force to be racially balanced. Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703 (j) makes clear that Title VII imposes no requirement that a work force mirror the general population. See, *e. g.*, *United States* v. *Sheet Metal Workers Local 36*, 416 F. 2d 123, 127 n. 7 (CA8). Considerations such as small sample size may, of course, detract from the value of such evidence, see, *e. g.*, *Mayor of Philadelphia* v. *Educational Equality League*, 415 U. S. 605, 620–621, and evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants would also be relevant. *Ibid.* See generally Schlei & Grossman, *supra*, n. 15, at 1161–1193.

"Since the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation. . . . In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved." *United States* v. *Ironworkers Local 86*, 443 F. 2d, at 551. See also, *e. g.*, *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211, 225 n. 34 (CA5); *Brown* v. *Gaston County Dyeing Mach. Co.*, 457 F. 2d 1377, 1382 (CA4); *United States* v. *Jacksonville Terminal Co.*, 451 F. 2d, at 442; *Parham* v. *Southwestern Bell Tel. Co.*, 433 F. 2d 421, 426 (CA8); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245, 247 (CA10).

ness situation as of the effective date of Title VII. The company concedes that its line drivers were virtually all white in July 1965, but it claims that thereafter business conditions were such that its work force dropped. Its argument is that low personnel turnover, rather than post-Act discrimination, accounts for more recent statistical disparities. It points to substantial minority hiring in later years, especially after 1971, as showing that any pre-Act patterns of discrimination were broken.

The argument would be a forceful one if this were an employer who, at the time of suit, had done virtually no new hiring since the effective date of Title VII. But it is not. Although the company's total number of employees apparently dropped somewhat during the late 1960's, the record shows that many line drivers continued to be hired throughout this period, and that almost all of them were white.[21] To be sure, there were improvements in the company's hiring practices. The Court of Appeals commented that "T. I. M. E.-D. C.'s recent minority hiring progress stands as a laudable good faith effort to eradicate the effects of past discrimination in the area of hiring and initial assignment." [22] 517 F. 2d, at 316. But the District Court and the Court of Appeals found upon substantial evidence that the company had engaged in a course of discrimination that continued well after the effective date of Title VII. The company's later changes in its hiring and

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[21] Between July 2, 1965, and January 1, 1969, hundreds of line drivers were hired systemwide, either from the outside or from the ranks of employees filling other jobs within the company. None was a Negro. Government Exhibit 204.

[22] For example, in 1971 the company hired 116 new line drivers, of whom 16 were Negro or Spanish-surnamed Americans. Minority employees composed 7.1% of the company's systemwide work force in 1967 and 10.5% in 1972. Minority hiring increased greatly in 1972 and 1973, presumably due at least in part to the existence of the consent decree. See 517 F. 2d, at 316 n. 31.

promotion policies could be of little comfort to the victims of the earlier post-Act discrimination, and could not erase its previous illegal conduct or its obligation to afford relief to those who suffered because of it. Cf. *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 413–423.[23]

The District Court and the Court of Appeals, on the basis of substantial evidence, held that the Government had proved a prima facie case of systematic and purposeful employment discrimination, continuing well beyond the effective date of Title VII. The company's attempts to rebut that conclusion were held to be inadequate.[24] For the reasons we have sum-

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[23] The company's narrower attacks upon the statistical evidence—that there was no precise delineation of the areas referred to in the general population statistics, that the Government did not demonstrate that minority populations were located close to terminals or that transportation was available, that the statistics failed to show what portion of the minority population was suited by age, health, or other qualifications to hold trucking jobs, etc.—are equally lacking in force. At best, these attacks go only to the accuracy of the comparison between the composition of the company's work force at various terminals and the general population of the surrounding communities. They detract little from the Government's further showing that Negroes and Spanish-surnamed Americans who were hired were overwhelmingly excluded from line-driver jobs. Such employees were willing to work, had access to the terminal, were healthy and of working age, and often were at least sufficiently qualified to hold city-driver jobs. Yet they became line drivers with far less frequency than whites. See, *e. g.*, Pretrial Stipulation 14, summarized in 517 F. 2d, at 312 n. 24 (of 2,919 whites who held driving jobs in 1971, 1,802 (62%) were line drivers and 1,117 (38%) were city drivers; of 180 Negroes and Spanish-surnamed Americans who held driving jobs, 13 (7%) were line drivers and 167 (93%) were city drivers).

In any event, fine tuning of the statistics could not have obscured the glaring absence of minority line drivers. As the Court of Appeals remarked, the company's inability to rebut the inference of discrimination came not from a misuse of statistics but from "the inexorable zero." *Id.*, at 315.

[24] The company's evidence, apart from the showing of recent changes in hiring and promotion policies, consisted mainly of general statements that

marized, there is no warrant for this Court to disturb the findings of the District Court and the Court of Appeals on this basic issue. See *Blau* v. *Lehman*, 368 U. S. 403, 408–409; *Faulkner* v. *Gibbs*, 338 U. S. 267, 268; *United States* v. *Dickinson*, 331 U. S. 745, 751; *United States* v. *Commercial Credit Co.*, 286 U. S. 63, 67; *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 14; *Baker* v. *Schofield*, 243 U. S. 114, 118; *Towson* v. *Moore*, 173 U. S. 17, 24.

B

The District Court and the Court of Appeals also found that the seniority system contained in the collective-bargaining agreements between the company and the union operated to violate Title VII of the Act.

For purposes of calculating benefits, such as vacations, pensions, and other fringe benefits, an employee's seniority under this system runs from the date he joins the company, and takes into account his total service in all jobs and bargaining units. For competitive purposes, however, such as determining the order in which employees may bid for particular jobs, are laid off, or are recalled from layoff, it is bargaining-unit seniority that controls. Thus, a line driver's seniority,

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it hired only the best qualified applicants. But "affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion." *Alexander* v. *Louisiana*, 405 U. S. 625, 632.

The company also attempted to show that all of the witnesses who testified to specific instances of discrimination either were not discriminated against or suffered no injury. The Court of Appeals correctly ruled that the trial judge was not bound to accept this testimony and that it committed no error by relying instead on the other overpowering evidence in the case. 517 F. 2d, at 315. The Court of Appeals was also correct in the view that individual proof concerning each class member's specific injury was appropriately left to proceedings to determine individual relief. In a suit brought by the Government under § 707 (a) of the Act the District Court's initial concern is in deciding whether the Government has proved that the defendant has engaged in a pattern or practice of discriminatory conduct. See *infra*, at 360–362.

for purposes of bidding for particular runs [25] and protection against layoff, takes into account only the length of time he has been a line driver at a particular terminal.[26] The practical effect is that a city driver or serviceman who transfers to a line-driver job must forfeit all the competitive seniority he has accumulated in his previous bargaining unit and start at the bottom of the line drivers' "board."

The vice of this arrangement, as found by the District Court and the Court of Appeals, was that it "locked" minority workers into inferior jobs and perpetuated prior discrimination by discouraging transfers to jobs as line drivers. While the disincentive applied to all workers, including whites, it was Negroes and Spanish-surnamed persons who, those courts found, suffered the most because many of them had been denied the equal opportunity to become line drivers when they were initially hired, whereas whites either had not sought or were refused line-driver positions for reasons unrelated to their race or national origin.

The linchpin of the theory embraced by the District Court and the Court of Appeals was that a discriminatee who must forfeit his competitive seniority in order finally to obtain a line-driver job will never be able to "catch up" to the seniority level of his contemporary who was not subject to discrimination.[27] Accordingly, this continued, built-in disadvantage to

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[25] Certain long-distance runs, for a variety of reasons, are more desirable than others. The best runs are chosen by the line drivers at the top of the "board"—a list of drivers arranged in order of their bargaining-unit seniority.

[26] Both bargaining-unit seniority and company seniority rights are generally limited to service at one particular terminal, except as modified by the Southern Conference Area Over-the-Road Supplemental Agreement. See n. 10, *supra*.

[27] An example would be a Negro who was qualified to be a line driver in 1958 but who, because of his race, was assigned instead a job as a city driver, and is allowed to become a line driver only in 1971. Because he loses his competitive seniority when he transfers jobs, he is forever junior

the prior discriminatee who transfers to a line-driver job was held to constitute a continuing violation of Title VII, for which both the employer and the union who jointly created and maintain the seniority system were liable.

The union, while acknowledging that the seniority system may in some sense perpetuate the effects of prior discrimination, asserts that the system is immunized from a finding of illegality by reason of § 703 (h) of Title VII, 42 U. S. C. § 2000e–2 (h), which provides in part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race . . . or national origin . . . ."

It argues that the seniority system in this case is "bona fide" within the meaning of § 703 (h) when judged in light of its history, intent, application, and all of the circumstances under which it was created and is maintained. More specifically, the union claims that the central purpose of § 703 (h) is to ensure that mere perpetuation of *pre-Act* discrimination is not unlawful under Title VII. And, whether or not § 703 (h) immunizes the perpetuation of *post-Act* discrimination, the union claims that the seniority system in this litigation has no such effect. Its position in this Court, as has been its position throughout this litigation, is that the seniority system presents no hurdle to post-Act discrim-

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to white line drivers hired between 1958 and 1970. The whites, rather than the Negro, will henceforth enjoy the preferable runs and the greater protection against layoff. Although the original discrimination occurred in 1958—before the effective date of Title VII—the seniority system operates to carry the effects of the earlier discrimination into the present.

inatees who seek retroactive seniority to the date they would have become line drivers but for the company's discrimination. Indeed, the union asserts that under its collective-bargaining agreements the union will itself take up the cause of the post-Act victim and attempt, through grievance procedures, to gain for him full "make whole" relief, including appropriate seniority.

The Government responds that a seniority system that perpetuates the effects of prior discrimination—pre-Act or post-Act—can never be "bona fide" under § 703 (h); at a minimum Title VII prohibits those applications of a seniority system that perpetuate the effects on incumbent employees of prior discriminatory job assignments.

The issues thus joined are open ones in this Court.[28] We considered § 703 (h) in *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, but there decided only that § 703 (h) does not bar the award of retroactive seniority to job applicants who seek relief from an employer's post-Act hiring discrimination. We stated that "the thrust of [§ 703 (h)] is directed toward

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[28] Concededly, the view that § 703 (h) does not immunize seniority systems that perpetuate the effects of prior discrimination has much support. It was apparently first adopted in *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (ED Va.). The court there held that "a departmental seniority system *that has its genesis in racial discrimination* is not a *bona fide* seniority system." *Id.*, at 517 (first emphasis added). The *Quarles* view has since enjoyed wholesale adoption in the Courts of Appeals. See, *e. g.*, *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F. 2d 980, 987–988 (CA5); *United States* v. *Sheet Metal Workers Local 36*, 416 F. 2d, at 133–134, n. 20; *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 658–659 (CA2); *United States* v. *Chesapeake & Ohio R. Co.*, 471 F. 2d 582, 587–588 (CA4). Insofar as the result in *Quarles* and in the cases that followed it depended upon findings that the seniority systems were themselves "racially discriminatory" or had their "genesis in racial discrimination," 279 F. Supp., at 517, the decisions can be viewed as resting upon the proposition that a seniority system that perpetuates the effects of pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adoption.

defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act." 424 U. S., at 761. Beyond noting the general purpose of the statute, however, we did not undertake the task of statutory construction required in this litigation.

(1)

Because the company discriminated both before and after the enactment of Title VII, the seniority system is said to have operated to perpetuate the effects of both pre- and post-Act discrimination. Post-Act discriminatees, however, may obtain full "make whole" relief, including retroactive seniority under *Franks* v. *Bowman, supra,* without attacking the legality of the seniority system as applied to them. *Franks* made clear and the union acknowledges that retroactive seniority may be awarded as relief from an employer's discriminatory hiring and assignment policies even if the seniority system agreement itself makes no provision for such relief.[29] 424 U. S., at 778–779. Here the Government has proved that the company engaged in a post-Act pattern of discriminatory hiring, assignment, transfer, and promotion policies. Any Negro or Spanish-surnamed American injured by those policies

[29] Article 38 of the National Master Freight Agreement between the company and the union in effect as of the date of the systemwide lawsuit provided:

"The Employer and the Union agree not to discriminate against any individual with respect to his hiring, compensation, terms or conditions of employment because of such individual's race, color, religion, sex, or national origin, nor will they limit, segregate or classify employees in any way to deprive any individual employee of employment opportunities because of his race, color, religion, sex, or national origin."

Any discrimination by the company would apparently be a "grievable" breach of this provision of the contract.

may receive all appropriate relief as a direct remedy for this discrimination.[30]

(2)

What remains for review is the judgment that the seniority system unlawfully perpetuated the effects of *pre-Act* discrimination. We must decide, in short, whether § 703 (h) validates otherwise bona fide seniority systems that afford no constructive seniority to victims discriminated against prior to the effective date of Title VII, and it is to that issue that we now turn.

The primary purpose of Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green*, 411 U. S., at 800.[31] See also *Albemarle Paper Co.* v. *Moody*, 422 U. S., at

[30] The legality of the seniority system insofar as it perpetuates post-Act discrimination nonetheless remains at issue in this case, in light of the injunction entered against the union. See *supra*, at 331. Our decision today in *United Air Lines, Inc.* v. *Evans*, *post*, p. 553, is largely dispositive of this issue. *Evans* holds that the operation of a seniority system is not unlawful under Title VII even though it perpetuates post-Act discrimination that has not been the subject of a timely charge by the discriminatee. Here, of course, the Government has sued to remedy the post-Act discrimination directly, and there is no claim that any relief would be time barred. But this is simply an additional reason not to hold the seniority system unlawful, since such a holding would in no way enlarge the relief to be awarded. See *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 778–779. Section 703 (h) on its face immunizes all bona fide seniority systems, and does not distinguish between the perpetuation of pre- and post-Act discrimination.

[31] We also noted in *McDonnell Douglas*:

"There are societal as well as personal interests on both sides of this [employer-employee] equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise." 411 U. S., at 801.

417–418; *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44; *Griggs* v. *Duke Power Co.*, 401 U. S., at 429–431. To achieve this purpose, Congress "proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.*, at 431. Thus, the Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group. *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 137; *Washington* v. *Davis*, 426 U. S., at 246–247; *Albemarle Paper Co.* v. *Moody*, *supra*, at 422, 425; *McDonnell Douglas Corp.* v. *Green*, *supra*, at 802 n. 14; *Griggs* v. *Duke Power Co.*, *supra*.

One kind of practice "fair in form, but discriminatory in operation" is that which perpetuates the effects of prior discrimination.[32] As the Court held in *Griggs*: "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U. S., at 430.

Were it not for § 703 (h), the seniority system in this case would seem to fall under the *Griggs* rationale. The heart of the system is its allocation of the choicest jobs, the greatest protection against layoffs, and other advantages to those employees who have been line drivers for the longest time. Where, because of the employer's prior intentional discrim-

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[32] *Asbestos Workers Local 53* v. *Vogler*, 407 F. 2d 1047 (CA5), provides an apt illustration. There a union had a policy of excluding persons not related to present members by blood or marriage. When in 1966 suit was brought to challenge this policy, all of the union's members were white, largely as a result of pre-Act, intentional racial discrimination. The court observed: "While the nepotism requirement is applicable to black and white alike and is not on its face discriminatory, in a completely white union the present effect of its continued application is to forever deny to negroes and Mexican-Americans any real opportunity for membership." *Id.*, at 1054.

ination, the line drivers with the longest tenure are without exception white, the advantages of the seniority system flow disproportionately to them and away from Negro and Spanish-surnamed employees who might by now have enjoyed those advantages had not the employer discriminated before the passage of the Act. This disproportionate distribution of advantages does in a very real sense "operate to 'freeze' the status quo of prior discriminatory employment practices." But both the literal terms of § 703 (h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them.

Throughout the initial consideration of H. R. 7152, later enacted as the Civil Rights Act of 1964, critics of the bill charged that it would destroy existing seniority rights.[33] The consistent response of Title VII's congressional proponents and of the Justice Department was that seniority rights would not be affected, even where the employer had discriminated prior to the Act.[34] An interpretive memorandum placed in the Congressional Record by Senators Clark and Case stated:

> "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, *if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis.* He would not be obliged—or in-

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[33] *E. g.*, H. R. Rep. No. 914, 88th Cong., 1st Sess., 65–66, 71 (1963) (minority report); 110 Cong. Rec. 486–488 (1964) (remarks of Sen. Hill); *id.*, at 2726 (remarks of Rep. Dowdy); *id.*, at 7091 (remarks of Sen. Stennis).

[34] In addition to the material cited in *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 759–762, see 110 Cong. Rec. 1518 (1964) (remarks of Rep. Celler); *id.*, at 6549 (remarks of Sen. Humphrey); *id.*, at 6564 (remarks of Sen. Kuchel).

> deed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier." 110 Cong. Rec. 7213 (1964) (emphasis added).[35]

A Justice Department statement concerning Title VII, placed in the Congressional Record by Senator Clark, voiced the same conclusion:

> "Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. *This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes.*" *Id.*, at 7207 (emphasis added).[36]

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[35] Senators Clark and Case were the "bipartisan captains" responsible for Title VII during the Senate debate. Bipartisan captains were selected for each title of the Civil Rights Act by the leading proponents of the Act in both parties. They were responsible for explaining their title in detail, defending it, and leading discussion on it. See *id.*, at 6528 (remarks of Sen. Humphrey); Vaas, Title VII: Legislative History, 7 B. C. Ind. & Com. L. Rev. 431, 444–445 (1966).

[36] The full text of the statement is set out in *Franks* v. *Bowman Transportation Co.*, *supra*, at 760 n. 16. Senator Clark also introduced a set of answers to questions propounded by Senator Dirksen, which included the following exchange:

"Question. Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?

"Answer. Seniority rights are in no way affected by the bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired,' he can still be 'first fired' as long as it is done because of his status as 'last

While these statements were made before § 703 (h) was added to Title VII, they are authoritative indicators of that section's purpose. Section 703 (h) was enacted as part of the Mansfield-Dirksen compromise substitute bill that cleared the way for the passage of Title VII.[37] The drafters of the compromise bill stated that one of its principal goals was to resolve the ambiguities in the House-passed version of H. R. 7152. See, *e. g.*, 110 Cong. Rec. 11935–11937 (1964) (remarks of Sen. Dirksen); *id.*, at 12707 (remarks of Sen. Humphrey). As the debates indicate, one of those ambiguities concerned Title VII's impact on existing collectively bargained seniority rights. It is apparent that § 703 (h) was drafted with an eye toward meeting the earlier criticism on this issue with an explicit provision embodying the understanding and assurances of the Act's proponents, namely, that Title VII would not outlaw such differences in treatment among employees as flowed from a bona fide seniority system that allowed for full exercise of seniority accumulated before the effective date of the Act. It is inconceivable that § 703 (h), as part of a compromise bill, was intended to vitiate the earlier representations of the Act's supporters by increasing Title VII's impact on seniority systems. The statement of Senator Humphrey, noted in *Franks*, 424 U. S., at 761, confirms that the addition of § 703 (h) "merely clarifies [Title VII's] present intent and effect." 110 Cong. Rec. 12723 (1964).

In sum, the unmistakable purpose of § 703 (h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. As the legislative history shows, this was the intended result even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes. Although a seniority system inevitably tends to perpetuate the effects of

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hired' and not because of his race." 110 Cong. Rec. 7217 (1964). See *Franks*, *supra*, at 760 n. 16.

[37] See *Franks* v. *Bowman Transportation Co.*, *supra*, at 761; Vaas, *supra*, n. 35, at 435.

pre-Act discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.

To be sure, § 703 (h) does not immunize all seniority systems. It refers only to "bona fide" systems, and a proviso requires that any differences in treatment not be "the result of an intention to discriminate because of race . . . or national origin . . . ." But our reading of the legislative history compels us to reject the Government's broad argument that no seniority system that tends to perpetuate pre-Act discrimination can be "bona fide." To accept the argument would require us to hold that a seniority system becomes illegal simply because it allows the full exercise of the pre-Act seniority rights of employees of a company that discriminated before Title VII was enacted. It would place an affirmative obligation on the parties to the seniority agreement to subordinate those rights in favor of the claims of pre-Act discriminatees without seniority. The consequence would be a perversion of the congressional purpose. We cannot accept the invitation to disembowel § 703 (h) by reading the words "bona fide" as the Government would have us do.[38] Accordingly, we hold that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may per-

[38] For the same reason, we reject the contention that the proviso in § 703 (h), which bars differences in treatment resulting from "an intention to discriminate," applies to any application of a seniority system that may perpetuate past discrimination. In this regard the language of the Justice Department memorandum introduced at the legislative hearings, see *supra*, at 351, is especially pertinent: "It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of his race. . . . Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title." 110 Cong. Rec. 7207 (1964).

petuate pre-Act discrimination. Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees.[39]

That conclusion is inescapable even in a case, such as this one, where the pre-Act discriminatees are incumbent employees who accumulated seniority in other bargaining units. Although there seems to be no explicit reference in the legislative history to pre-Act discriminatees already employed in less desirable jobs, there can be no rational basis for distinguishing their claims from those of persons initially denied *any* job but hired later with less seniority than they might have had in the absence of pre-Act discrimination.[40] We rejected any such

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[39] The legislative history of the 1972 amendments to Title VII, summarized and discussed in *Franks*, 424 U. S., at 764–765, n. 21; *id.*, at 796–797, n. 18 (POWELL, J., concurring in part and dissenting in part), in no way points to a different result. As the discussion in *Franks* indicates, that history is itself susceptible of different readings. The few broad references to perpetuation of pre-Act discrimination or *"de facto* segregated job ladders," see, *e. g.*, S. Rep. No. 92–415, pp. 5, 9 (1971); H. R. Rep. No. 92–238, pp. 8, 17 (1971), did not address the specific issue presented by this case. And the assumption of the authors of the Conference Report that "the present case law as developed by the courts would continue to govern the applicability and construction of Title VII," see *Franks, supra*, at 765 n. 21, of course does not foreclose our consideration of that issue. More importantly, the section of Title VII that we construe here, § 703 (h), was enacted in 1964, not 1972. The views of members of a later Congress, concerning different sections of Title VII, enacted after this litigation was commenced, are entitled to little if any weight. It is the intent of the Congress that enacted § 703 (h) in 1964, unmistakable in this case, that controls.

[40] That Title VII did not proscribe the denial of fictional seniority to pre-Act discriminatees who got *no* job was recognized even in *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (ED Va.), and its progeny. *Quarles* stressed the fact that the references in the legislative history were to employment seniority rather than departmental seniority. *Id.*, at 516. In *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F. 2d 980 (CA5), another leading case in this area, the court obeserved:

distinction in *Franks*, finding that it had "no support anywhere in Title VII or its legislative history," 424 U. S., at 768. As discussed above, Congress in 1964 made clear that a seniority system is not unlawful because it honors employees' existing rights, even where the employer has engaged in pre-Act discriminatory hiring or promotion practices. It would be as contrary to that mandate to forbid the exercise of seniority rights with respect to discriminatees who held inferior jobs as with respect to later hired minority employees who previously were denied any job. If anything, the latter group is the more disadvantaged. As in *Franks*, " 'it would indeed be surprising if Congress gave a remedy for the one [group] which it denied for the other.' " *Ibid.*, quoting *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 187.[41]

(3)

The seniority system in this litigation is entirely bona fide. It applies equally to all races and ethnic groups. To the extent that it "locks" employees into non-line-driver jobs, it

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"No doubt, Congress, to prevent 'reverse discrimination' meant to protect certain seniority rights that could not have existed but for previous racial discrimination. For example a Negro who had been rejected by an employer on racial grounds before passage of the Act could not, after being hired, claim to outrank whites who had been hired before him but after his original rejection, even though the Negro might have had senior status but for the past discrimination." *Id.*, at 994.

[41] In addition, there is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plantwide seniority systems. Then, as now, seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression. See Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1534 (1962); Cooper & Sobol, Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1602 (1969). The legislative history contains no suggestion that any one system was preferred.

does so for all. The city drivers and servicemen who are discouraged from transferring to line-driver jobs are not all Negroes or Spanish-surnamed Americans; to the contrary, the overwhelming majority are white. The placing of line drivers in a separate bargaining unit from other employees is rational, in accord with the industry practice, and consistent with National Labor Relation Board precedents.[42] It is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose. In these circumstances, the single fact that the system extends no retroactive seniority to pre-Act discriminatees does not make it unlawful.

Because the seniority system was protected by § 703 (h), the union's conduct in agreeing to and maintaining the system did not violate Title VII. On remand, the District Court's injunction against the union must be vacated.[43]

III

Our conclusion that the seniority system does not violate Title VII will necessarily affect the remedy granted to individual employees on remand of this litigation to the District Court. Those employees who suffered only pre-Act discrimination are not entitled to relief, and no person may

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[42] See *Georgia Highway Express*, 150 N. L. R. B. 1649, 1651: "The Board has long held that local drivers and over-the-road drivers constitute separate appropriate units where they are shown to be clearly defined, homogeneous, and functionally distinct groups with separate interests which can effectively be represented separately for bargaining purposes. . . . In view of the different duties and functions, separate supervision, and different bases of payment, it is clear that the over-the-road drivers have divergent interests from those of the employees in the [city operations] unit . . . and should not be included in that unit."

[43] The union will properly remain in this litigation as a defendant so that full relief may be awarded the victims of the employer's post-Act discrimination. Fed. Rule Civ. Proc. 19 (a). See *EEOC* v. *Mac-Millan Bloedel Containers, Inc.*, 503 F. 2d 1086, 1095 (CA6).

be given retroactive seniority to a date earlier than the effective date of the Act. Several other questions relating to the appropriate measure of individual relief remain, however, for our consideration.

The petitioners argue generally that the trial court did not err in tailoring the remedy to the "degree of injury" suffered by each individual employee, and that the Court of Appeals' "qualification date" formula sweeps with too broad a brush by granting a remedy to employees who were not shown to be actual victims of unlawful discrimination. Specifically, the petitioners assert that no employee should be entitled to relief until the Government demonstrates that he was an actual victim of the company's discriminatory practices; that no employee who did not apply for a line-driver job should be granted retroactive competitive seniority; and that no employee should be elevated to a line-driver job ahead of any current line driver on layoff status. We consider each of these contentions separately.

A

The petitioners' first contention is in substance that the Government's burden of proof in a pattern-or-practice case must be equivalent to that outlined in *McDonnell Douglas* v. *Green*. Since the Government introduced specific evidence of company discrimination against only some 40 employees, they argue that the District Court properly refused to award retroactive seniority to the remainder of the class of minority incumbent employees.

In *McDonnell Douglas* the Court considered "the order and allocation of proof in a private, non-class action challenging employment discrimination." 411 U. S., at 800. We held that an individual Title VII complainant must carry the initial burden of proof by establishing a prima facie case of racial discrimination. On the specific facts there involved, we concluded that this burden was met by showing that a

qualified applicant, who was a member of a racial minority group, had unsuccessfully sought a job for which there was a vacancy and for which the employer continued thereafter to seek applicants with similar qualifications. This initial showing justified the inference that the minority applicant was denied an employment opportunity for reasons prohibited by Title VII, and therefore shifted the burden to the employer to rebut that inference by offering some legitimate, nondiscriminatory reason for the rejection. *Id.*, at 802.

The company and union seize upon the *McDonnell Douglas* pattern as the *only* means of establishing a prima facie case of individual discrimination. Our decision in that case, however, did not purport to create an inflexible formulation. We expressly noted that "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations." *Id.*, at 802 n. 13. The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.[44]

In *Franks* v. *Bowman Transportation Co.*, the Court applied

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[44] The *McDonnell Douglas* case involved an individual complainant seeking to prove one instance of unlawful discrimination. An employer's isolated decision to reject an applicant who belongs to a racial minority does not show that the rejection was racially based. Although the *McDonnell Douglas* formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.

this principle in the context of a class action. The *Franks* plaintiffs proved, to the satisfaction of a District Court, that Bowman Transportation Co. "had engaged in a pattern of racial discrimination in various company policies, including the hiring, transfer, and discharge of employees." 424 U. S., at 751. Despite this showing, the trial court denied seniority relief to certain members of the class of discriminatees because not every individual had shown that he was qualified for the job he sought and that a vacancy had been available. We held that the trial court had erred in placing this burden on the individual plaintiffs. By "demonstrating the existence of a discriminatory hiring pattern and practice" the plaintiffs had made out a prima facie case of discrimination against the individual class members; the burden therefore shifted to the employer "to prove that individuals who reapply were not in fact victims of previous hiring discrimination." *Id.*, at 772. The *Franks* case thus illustrates another means by which a Title VII plaintiff's initial burden of proof can be met. The class there alleged a broad-based policy of employment discrimination; upon proof of that allegation there were reasonable grounds to infer that individual hiring decisions were made in pursuit of the discriminatory policy and to require the employer to come forth with evidence dispelling that inference.[45]

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[45] The holding in *Franks* that proof of a discriminatory pattern and practice creates a rebuttable presumption in favor of individual relief is consistent with the manner in which presumptions are created generally. Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof. See C. McCormick, Law of Evidence §§ 337, 343 (2d ed. 1972); James, Burdens of Proof, 47 Va. L. Rev. 51, 61 (1961). See also *Keyes* v. *School Dist. No. 1*, 413 U. S. 189, 208–209. These factors were present in *Franks*. Although the prima facie case did not conclusively demonstrate that all of the employer's decisions were part of the proved discriminatory pattern and practice, it did create a greater likelihood that any single decision was a component of the overall pattern. Moreover, the

Although not all class actions will necessarily follow the *Franks* model, the nature of a pattern-or-practice suit brings it squarely within our holding in *Franks*. The plaintiff in a pattern-or-practice action is the Government, and its initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers. See *supra*, at 336, and n. 16. At the initial, "liability" stage of a pattern-or-practice suit the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed. The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the Government's proof is either inaccurate or insignificant. An employer might show, for example, that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination, or that during the period it is alleged to have pursued a discriminatory policy it made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination.[46]

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finding of a pattern or practice changed the position of the employer to that of a proved wrongdoer. Finally, the employer was in the best position to show why any individual employee was denied an employment opportunity. Insofar as the reasons related to available vacancies or the employer's evaluation of the applicant's qualifications, the company's records were the most relevant items of proof. If the refusal to hire was based on other factors, the employer and its agents knew best what those factors were and the extent to which they influenced the decisionmaking process.

[46] The employer's defense must, of course, be designed to meet the prima facie case of the Government. We do not mean to suggest that there are any particular limits on the type of evidence an employer may use. The point is that at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking. While a pattern might be demonstrated by examining the discrete decisions of which it is composed, the Govern-

If an employer fails to rebut the inference that arises from the Government's prima facie case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy. Without any further evidence from the Government, a court's finding of a pattern or practice justifies an award of prospective relief. Such relief might take the form of an injunctive order against continuation of the discriminatory practice, an order that the employer keep records of its future employment decisions and file periodic reports with the court, or any other order "necessary to ensure the full enjoyment of the rights" protected by Title VII.[47]

When the Government seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief. The petitioners' contention in this case is that if the Government has not, in the course of proving a pattern or practice, already brought forth specific evidence that each individual was discriminatorily denied an employment opportunity, it must carry that burden at the second, "remedial" stage of trial. That basic contention was rejected in the *Franks* case. As was true of the particular facts in *Franks*, and as is typical of Title VII pattern-or-practice suits, the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination. The force of that proof does not dissipate at the remedial stage

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ment's suits have more commonly involved proof of the expected result of a regularly followed discriminatory policy. In such cases the employer's burden is to provide a nondiscriminatory explanation for the apparently discriminatory result. See n. 20, *supra*, and cases cited therein.

[47] The federal courts have freely exercised their broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of § 707 (a) eliminate their discriminatory practices and the effects therefrom. See, *e. g.*, cases cited in n. 51, *infra*. In this case prospective relief was incorporated in the parties' consent decree. See n. 4, *supra*.

of the trial. The employer cannot, therefore, claim that there is no reason to believe that its individual employment decisions were discriminatorily based; it has already been shown to have maintained a policy of discriminatory decisionmaking.

The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy. The Government need only show that an alleged individual discriminatee unsuccessfully applied for a job [48] and therefore was a potential victim of the proved discrimination. As in *Franks*, the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons. See 424 U. S., at 773 n. 32.

In Part II–A, *supra*, we have held that the District Court and Court of Appeals were not in error in finding that the Government had proved a systemwide pattern and practice of racial and ethnic discrimination on the part of the company. On remand, therefore, every post-Act minority group applicant [49] for a line-driver position will be presumptively entitled to relief, subject to a showing by the company that its earlier refusal to place the applicant in a line-driver job was not based on its policy of discrimination.[50]

B

The Court of Appeals' "qualification date" formula for relief did not distinguish between incumbent employees who

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[48] Nonapplicants are discussed in Part III–B, *infra*.

[49] Employees who initially applied for line-driver jobs and were hired in other jobs before the effective date of the Act, and who did not later apply for transfer to line-driver jobs, are part of the group of nonapplicants discussed *infra*.

[50] Any nondiscriminatory justification offered by the company will be subject to further evidence by the Government that the purported reason for an applicant's rejection was in fact a pretext for unlawful discrimination. *McDonnell Douglas Corp.* v. *Green*, 411 U. S., at 804–806.

had applied for line-driver jobs and those who had not. The appellate court held that where there has been a showing of classwide discriminatory practices coupled with a seniority system that perpetuates the effects of that discrimination, an individual member of the class need not show that he unsuccessfully applied for the position from which the class had been excluded. In support of its award of relief to all nonapplicants, the Court suggested that "as a practical matter . . . a member of the affected class may well have concluded that an application for transfer to an all White position such as [line driver] was not worth the candle." 517 F. 2d, at 320.

The company contends that a grant of retroactive seniority to these nonapplicants is inconsistent with the make-whole purpose of a Title VII remedy and impermissibly will require the company to give preferential treatment to employees solely because of their race. The thrust of the company's contention is that unless a minority-group employee actually applied for a line-driver job, either for initial hire or for transfer, he has suffered no injury from whatever discrimination might have been involved in the refusal of such jobs to those who actually applied for them.

The Government argues in response that there should be no "immutable rule" that nonapplicants are nonvictims, and contends that a determination whether nonapplicants have suffered from unlawful discrimination will necessarily vary depending on the circumstances of each particular case. The Government further asserts that under the specific facts of this case, the Court of Appeals correctly determined that all qualified nonapplicants were likely victims and were therefore presumptively entitled to relief.

The question whether seniority relief may be awarded to nonapplicants was left open by our decision in *Franks*, since the class at issue in that case was limited to "identifiable applicants who were denied employment . . . after the effective date . . . of Title VII." 424 U. S., at 750. We now

decide that an incumbent employee's failure to apply for a job is not an inexorable bar to an award of retroactive seniority. Individual nonapplicants must be given an opportunity to undertake their difficult task of proving that they should be treated as applicants and therefore are presumptively entitled to relief accordingly.

(1)

Analysis of this problem must begin with the premise that the scope of a district court's remedial powers under Title VII is determined by the purposes of the Act. *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 417. In *Griggs* v. *Duke Power Co.*, and again in *Albemarle*, the Court noted that a primary objective of Title VII is prophylactic: to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees. 401 U. S., at 429–430; 422 U. S., at 417. The prospect of retroactive relief for victims of discrimination serves this purpose by providing the " 'spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' " of their discriminatory practices. *Id.*, at 417–418. An equally important purpose of the Act is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.*, at 418. In determining the specific remedies to be afforded, a district court is "to fashion such relief as the particular circumstances of a case may require to effect restitution." *Franks*, 424 U. S., at 764.

Thus, the Court has held that the purpose of Congress in vesting broad equitable powers in Title VII courts was "to make possible the 'fashion[ing] [of] the most complete relief possible,' " and that the district courts have " 'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' " *Albemarle*,

supra, at 421, 418. More specifically, in *Franks* we decided that a court must ordinarily award a seniority remedy unless there exist reasons for denying relief " 'which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination . . . and making persons whole for injuries suffered.' " 424 U. S., at 771, quoting *Albemarle*, *supra*, at 421.

Measured against these standards, the company's assertion that a person who has not actually applied for a job can *never* be awarded seniority relief cannot prevail. The effects of and the injuries suffered from discriminatory employment practices are not always confined to those who were expressly denied a requested employment opportunity. A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.

If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices—by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups.[51] When a person's

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[51] The far-ranging effects of subtle discriminatory practices have not escaped the scrutiny of the federal courts, which have provided relief from practices designed to discourage job applications from minority-group members. See, *e. g.*, *Franks* v. *Bowman Transportation Co.*, 495 F. 2d 398, 418–419 (CA5) (public recruitment and advertising), rev'd on other grounds, 424 U. S. 747; *Carter* v. *Gallagher*, 452 F. 2d 315, 319 (CA8)

desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

In cases decided under the National Labor Relations Act, the model for Title VII's remedial provisions, *Albemarle, supra,* at 419; *Franks, supra,* at 769, the National Labor Relations Board, and the courts in enforcing its orders, have recognized that the failure to submit a futile application does not bar an award of relief to a person claiming that he was denied employment because of union affiliation or activity. In *NLRB* v. *Nevada Consolidated Copper Corp.,* 316 U. S. 105, this Court enforced an order of the Board directing an employer to hire, with retroactive benefits, former employees who had not applied for newly available jobs because of the employer's well-known policy of refusing to hire union members. See *In re Nevada Consolidated Copper Corp.,* 26 N. L. R. B. 1182, 1208, 1231. Similarly, when an application would have been no more than a vain gesture in light of employer discrimination, the Courts of Appeals have enforced Board orders reinstating striking workers despite the failure of individual strikers to apply for reinstatement when the strike ended. *E. g., NLRB* v. *Park Edge Sheridan Meats, Inc.,* 323 F. 2d 956 (CA2); *NLRB* v. *Valley Die Cast Corp.,* 303 F. 2d 64 (CA6); *Eagle-Picher Mining & Smelting Co.* v. *NLRB,* 119 F. 2d 903 (CA8). See also *Piasecki Aircraft Corp.* v. *NLRB,* 280 F. 2d 575 (CA3); *NLRB* v. *Anchor Rome Mills,*

(recruitment); *United States* v. *Jacksonville Terminal Co.,* 451 F. 2d, at 458 (posting of job vacancies and job qualification requirements); *United States* v. *Local No. 86, Ironworkers,* 315 F. Supp. 1202, 1238, 1245–1246 (WD Wash.) (dissemination of information), aff'd, 443 F. 2d 544 (CA9). While these measures may be effective in preventing the deterrence of future applicants, they afford no relief to those persons who in the past desired jobs but were intimidated and discouraged by employment discrimination.

228 F. 2d 775 (CA5); *NLRB* v. *Lummus Co.*, 210 F. 2d 377 (CA5). Consistent with the NLRA model, several Courts of Appeals have held in Title VII cases that a nonapplicant can be a victim of unlawful discrimination entitled to make-whole relief when an application would have been a useless act serving only to confirm a discriminatee's knowledge that the job he wanted was unavailable to him. *Acha* v. *Beame*, 531 F. 2d 648, 656 (CA2); *Hairston* v. *McLean Trucking Co.*, 520 F. 2d 226, 231–233 (CA4); *Bing* v. *Roadway Express, Inc.*, 485 F. 2d 441, 451 (CA5); *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354, 369 (CA8).

The denial of Title VII relief on the ground that the claimant had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from members of minority groups. A *per se* prohibition of relief to nonapplicants could thus put beyond the reach of equity the most invidious effects of employment discrimination—those that extend to the very hope of self-realization. Such a *per se* limitation on the equitable powers granted to courts by Title VII would be manifestly inconsistent with the "historic purpose of equity to 'secur[e] complete justice' " and with the duty of courts in Title VII cases " 'to render a decree which will so far as possible eliminate the discriminatory effects of the past.' " *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 418.

(2)

To conclude that a person's failure to submit an application for a job does not inevitably and forever foreclose his entitlement to seniority relief under Title VII is a far cry, however, from holding that nonapplicants are always entitled to such relief. A nonapplicant must show that he was a potential victim of unlawful discrimination. Because he is necessarily

claiming that he was deterred from applying for the job by the employer's discriminatory practices, his is the not always easy burden of proving that he would have applied for the job had it not been for those practices. Cf. *Mt. Healthy City Board of Education* v. *Doyle*, 429 U. S. 274. When this burden is met, the nonapplicant is in a position analogous to that of an applicant and is entitled to the presumption discussed in Part III–A, *supra*.

The Government contends that the evidence it presented in this case at the liability stage of the trial identified all nonapplicants as victims of unlawful discrimination "with a fair degree of specificity," and that the Court of Appeals' determination that qualified nonapplicants are presumptively entitled to an award of seniority should accordingly be affirmed. In support of this contention the Government cites its proof of an extended pattern and practice of discrimination as evidence that an application from a minority employee for a line-driver job would have been a vain and useless act. It further argues that since the class of nonapplicant discriminatees is limited to incumbent employees, it is likely that every class member was aware of the futility of seeking a line-driver job and was therefore deterred from filing both an initial and a followup application.[52]

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[52] The limitation to incumbent employees is also said to serve the same function that actual job applications served in *Franks:* providing a means of distinguishing members of the excluded minority group from minority members of the public at large. While it is true that incumbency in this case and actual applications in *Franks* both serve to narrow what might otherwise be an impossible task, the statuses of nonincumbent applicant and nonapplicant incumbent differ substantially. The refused applicants in *Franks* had been denied an opportunity they clearly sought, and the only issue to be resolved was whether the denial was pursuant to a proved discriminatory practice. Resolution of the nonapplicant's claim, however, requires two distinct determinations: that he would have applied but for discrimination and that he would have been discriminatorily rejected had he applied. The mere fact of incumbency does not resolve

We cannot agree. While the scope and duration of the company's discriminatory policy can leave little doubt that the futility of seeking line-driver jobs was communicated to the company's minority employees, that in itself is insufficient. The known prospect of discriminatory rejection shows only that employees who wanted line-driving jobs may have been deterred from applying for them. It does not show which of the nonapplicants actually wanted such jobs, or which possessed the requisite qualifications.[53] There are differences between city- and line-driving jobs.[54] for example, but the desirability of the latter is not so self-evident as to warrant a conclusion that all employees would prefer to be line drivers if given a free choice.[55] Indeed, a substantial number of white

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the first issue, although it may tend to support a nonapplicant's claim to the extent that it shows he was willing and competent to work as a driver, that he was familiar with the tasks of line drivers, etc. An incumbent's claim that he would have applied for a line-driver job would certainly be more superficially plausible than a similar claim by a member of the general public who may never have worked in the trucking industry or heard of the company prior to suit.

[53] Inasmuch as the purpose of the nonapplicant's burden of proof will be to establish that his status is similar to that of the applicant, he must bear the burden of coming forward with the basic information about his qualifications that he would have presented in an application. As in *Franks*, and in accord with Part III–A, *supra*, the burden then will be on the employer to show that the nonapplicant was nevertheless not a victim of discrimination. For example, the employer might show that there were other, more qualified persons who would have been chosen for a particular vacancy, or that the nonapplicant's stated qualifications were insufficient. See *Franks*, 424 U. S., at 773 n. 32.

[54] Of the employees for whom the Government sought transfer to line-driving jobs, nearly one-third held city-driver positions.

[55] The company's line drivers generally earned more annually than its city drivers, but the difference varied from under $1,000 to more than $5,000 depending on the terminal and the year. In 1971 city drivers at two California terminals, "LOS" and San Francisco, earned substantially more than the line drivers at those terminals. In addition to earnings, line drivers have the advantage of not being required to load and unload their

city drivers who were not subjected to the company's discriminatory practices were apparently content to retain their city jobs.[56]

In order to fill this evidentiary gap, the Government argues that a nonapplicant's current willingness to transfer into a line-driver position confirms his past desire for the job. An employee's response to the court-ordered notice of his entitlement to relief [57] demonstrates, according to this argument, that

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trucks. City drivers, however, have regular working hours, are not required to spend extended periods away from home and family, and do not face the hazards of long-distance driving at high speeds. As the Government acknowledged at argument, the jobs are in some sense "parallel"—some may prefer one job and some may prefer another.

The District Court found generally that line-driver jobs "are considered the most desirable of the driving jobs." That finding is not challenged here, and we see no reason to disturb it. We observe only that the differences between city and line driving were not such that it can be said with confidence that all minority employees free from the threat of discriminatory treatment would have chosen to give up city for line driving.

[56] In addition to the futility of application, the Court of Appeals seems to have relied on the minority employees' accumulated seniority in non-line-driver positions in concluding that nonapplicants had been unlawfully deterred from applying. See 517 F. 2d, at 318, 320. The Government adopts that theory here, arguing that a nonapplicant who has accrued time at the company would be unlikely to have applied for transfer because he would have had to forfeit all of his competitive seniority and the job security that went with it. In view of our conclusion in Part II–B, *supra*, this argument detracts from rather than supports a nonapplicant's entitlement to relief. To the extent that an incumbent was deterred from applying by his desire to retain his competitive seniority, he simply did not want a line-driver job requiring him to start at the bottom of the "board." Those nonapplicants who did not apply for transfer because they were unwilling to give up their previously acquired seniority suffered only from a lawful deterrent imposed on all employees regardless of race or ethnicity. The nonapplicant's remedy in such cases is limited solely to the relief, if any, to which he may be entitled because of the discrimination he encountered at a time when he wanted to take a starting line-driver job.

[57] The District Court's final order required that the company notify each minority employee of the relief he was entitled to claim. The employee was

the employee would have sought a line-driver job when he first became qualified to fill one, but for his knowledge of the company's discriminatory policy.

This assumption falls short of satisfying the appropriate burden of proof. An employee who transfers into a line-driver unit is normally placed at the bottom of the seniority "board." He is thus in jeopardy of being laid off and must, at best, suffer through an initial period of bidding on only the least desirable runs. See *supra*, at 343–344, and n. 25. Nonapplicants who chose to accept the appellate court's *post hoc* invitation, however, would enter the line-driving unit with retroactive seniority dating from the time they were first qualified. A willingness to accept the job security and bidding power afforded by retroactive seniority says little about what choice an employee would have made had he previously been given the opportunity freely to choose a starting line-driver job. While it may be true that many of the nonapplicant employees desired and would have applied for line-driver jobs but for their knowledge of the company's policy of discrimination, the Government must carry its burden of proof, with respect to each specific individual, at the remedial hearings to be conducted by the District Court on remand.[58]

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The task remaining for the District Court on remand will not be a simple one. Initially, the court will have to make a substantial number of individual determinations in deciding which of the minority employees were actual victims

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then required to indicate, within 60 days, his willingness to accept the relief. Under the decision of the Court of Appeals, the relief would be qualification-date seniority.

[58] While the most convincing proof would be some overt act such as a pre-Act application for a line-driver job, the District Court may find evidence of an employee's informal inquiry, expression of interest, or even unexpressed desire credible and convincing. The question is a factual one for determination by the trial judge.

of the company's discriminatory practices. After the victims have been identified, the court must, as nearly as possible, " 'recreate the conditions and relationships that would have been had there been no' " unlawful discrimination. *Franks*, 424 U. S., at 769. This process of recreating the past will necessarily involve a degree of approximation and imprecision. Because the class of victims may include some who did not apply for line-driver jobs as well as those who did, and because more than one minority employee may have been denied each line-driver vacancy, the court will be required to balance the equities of each minority employee's situation in allocating the limited number of vacancies that were discriminatorily refused to class members.

Moreover, after the victims have been identified and their rightful place determined, the District Court will again be faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing. In the prejudgment consent decree, see n. 4, *supra*, the company and the Government agreed that minority employees would assume line-driver positions that had been discriminatorily denied to them by exercising a first-priority right to job vacancies at the company's terminals. The decree did not determine what constituted a vacancy, but in its final order the trial court defined "vacancy" to exclude any position that became available while there were laid-off employees awaiting an opportunity to return to work. Employees on layoff were given a preference to fill whatever openings might occur at their terminals during a three-year period after they were laid off.[59]

[59] Paragraph 9 (a) of the trial court's final order provided:

"A 'vacancy' as used in this Order, shall include any opening which is caused by the transfer or promotion to a position outside the bargaining unit, death, resignation or final discharge of an incumbent, or by an increase in operations or business where, ordinarily, additional employees would be put to work. A vacancy shall not exist where there are laid off employees on the seniority roster where the opening occurs. Such laid

The Court of Appeals rejected the preference and held that all but "purely temporary" vacancies were to be filled according to an employee's seniority, whether as a member of the class

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off employees shall have a preference to fill such laid off positions when these again become open without competition from the individuals granted relief in this case. However, if such layoff continues for three consecutive years the position will be deemed as 'vacant' with the right of all concerned to compete for the position, using their respective seniority dates, including those provided for in this Order."

The trial court's use of a three-year recall right is apparently derived from provisions in the collective-bargaining agreements. Article 5 of the National Master Freight Agreement (NMFA) establishes the seniority rights of employees covered by the Agreement. Under Art. 5, "[s]eniority rights for employees shall prevail . . . . Seniority shall only be broken by discharge, voluntary quit, [or] more than a three (3) year layoff." § 1. As is evident, the three-year layoff provision in the NMFA determines only when an employee shall lose *all* of his accumulated seniority; it does not determine either the order of layoff or the order of recall. Subject to other terms of the NMFA, Art. 2, § 2, "[t]he extent to which seniority shall be applied as well as the methods and procedures of such application" are left to the Supplemental Agreements. Art. 5, § 1. The Southern Conference Area Over-the-Road Supplemental Agreement, covering line drivers in the Southern Conference, also provides for a complete loss of seniority rights after a three-year layoff, Art. 42, § 1, and further provides that in the event of a reduction in force "the last employee hired shall be laid off first and when the force is again increased, the employees are to be returned to work in the reverse order in which they were laid off," Art. 42, § 3.

This order of layoff and recall, however, is limited by the NMFA in at least two situations involving an influx of employees from outside a terminal. Art. 5, § 3 (a) (1) (merger with a solvent company), § 5 (b) (2) (branch closing with transfer of operations to another branch). In these cases the NMFA provides for "dovetailing" the seniority rights of active and laid-off employees at the two facilities involved. *Ibid.;* see also NMFA, Art 15 (honoring Military Selective Service Act of 1967). The NMFA also recognizes that "questions of accrual, interpretation or application of seniority rights may arise which are not covered by the general rules set forth," and provides a procedure for resolution of unforeseen seniority problems. Art. 5, § 7. Presumably § 7 applies to persons claiming discriminatory denial of jobs and seniority in violation of Art. 38,

discriminated against or as an incumbent line driver on layoff. 517 F. 2d, at 322–323.

As their final contention concerning the remedy, the company and the union argue that the trial court correctly made the adjustment between the competing interests of discriminatees and other employees by granting a preference to laid-off employees, and that the Court of Appeals erred in disturbing it. The petitioners therefore urge the reinstatement of that part of the trial court's final order pertaining to the rate at which victims will assume their rightful places in the line-driver hierarchy.[60]

Although not directly controlled by the Act,[61] the extent to

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which prohibits discrimination in hiring as well as classification of employees so as to deprive them of employment opportunities on account of race or national origin. See n. 29, *supra*. The District Court apparently did not consider these provisions when it determined the recall rights of employees on layoff.

[60] In their briefs the petitioners also challenge the trial court's modification of the interterminal transfer rights of line drivers in the Southern Conference. See n. 10, *supra*. This question was not presented in either petition for certiorari and therefore is not properly before us. This Court's Rule 23 (1)(c). Our disposition of the claim that is presented, however, will permit the trial court to reconsider any part of the balance it struck in dealing with this issue.

[61] The petitioners argue that to permit a victim of discrimination to use his rightful-place seniority to bid on a line-driver job before the recall of all employees on layoff would amount to a racial or ethnic preference in violation of § 703 (j) of the Act. Section 703 (j) provides no support for this argument. It provides only that Title VII does not require an employer to grant preferential treatment to any group in order to rectify an imbalance between the composition of the employer's work force and the makeup of the population at large. See n. 20, *supra*. To allow identifiable victims of unlawful discrimination to participate in a layoff recall is not the kind of "preference" prohibited by § 703 (j). If a discriminatee is ultimately allowed to secure a position before a laid-off line driver, a question we do not now decide, he will do so because of the bidding power inherent in his rightful-place seniority, and not because of a preference

which the legitimate expectations of nonvictim employees should determine when victims are restored to their rightful place is limited by basic principles of equity. In devising and implementing remedies under Title VII, no less than in formulating any equitable decree, a court must draw on the "qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329–330. Cf. *Phelps Dodge Corp.* v. *NLRB*, 313 U. S., at 195–196, modifying 113 F. 2d 202 (CA2); 19 N. L. R. B. 547, 600; *Franks*, 424 U. S., at 798–799 (POWELL, J., concurring in part and dissenting in part). Especially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must "look to the practical realities and necessities inescapably involved in reconciling competing interests," in order to determine the "special blend of what is necessary, what is fair, and what is workable." *Lemon* v. *Kurtzman*, 411 U. S. 192, 200–201 (opinion of BURGER, C. J.).

Because of the limited facts now in the record, we decline to strike the balance in this Court. The District Court did not explain why it subordinated the interests of class members to the contractual recall expectations of other employees on layoff. When it made that determination, however, it was considering a class of more than 400 minority employees, all of whom had been granted some preference in filling line-driver vacancies. The overwhelming majority of these were in the District Court's subclass three, composed of those employees with respect to whom neither the Government nor the company had presented any specific evidence on the question of unlawful discrimination. Thus, when the court considered the problem of what constituted a line-driver "vacancy"

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based on race. See *Franks*, 424 U. S., at 792 (POWELL, J., concurring in part and dissenting in part).

to be offered to class members, it may have been influenced by the relatively small number of proved victims and the large number of minority employees about whom it had no information. On the other hand, the Court of Appeals redefined "vacancy" in the context of what it believed to be a class of more than 400 employees who had actually suffered from discrimination at the behest of both the company and the union, and its determination may well have been influenced by that understanding. For the reasons discussed in this opinion, neither court's concept was completely valid.

After the evidentiary hearings to be conducted on remand, both the size and the composition of the class of minority employees entitled to relief may be altered substantially. Until those hearings have been conducted and both the number of identifiable victims and the consequent extent of necessary relief have been determined, it is not possible to evaluate abstract claims concerning the equitable balance that should be struck between the statutory rights of victims and the contractual rights of nonvictim employees. That determination is best left, in the first instance, to the sound equitable discretion of the trial court.[62] See *Franks* v. *Bowman Transportation Co., supra,* at 779; *Albemarle Paper Co.* v. *Moody,* 422 U. S., at 416. We observe only that when the court exercises its discretion in dealing with the problem of laid-off employees in light of the facts developed at the hearings on remand, it should clearly state its reasons so that meaningful review may be had on appeal. See *Franks, supra,* at 774; *Albemarle Paper Co.* v. *Moody, supra,* at 421 n. 14.

For all the reasons we have discussed, the judgment of the Court of Appeals is vacated, and the cases are remanded to the

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[62] Other factors, such as the number of victims, the number of nonvictim employees affected and the alternatives available to them, and the economic circumstances of the industry may also be relevant in the exercise of the District Court's discretion. See *Franks, supra,* at 796 n. 17 (POWELL, J., concurring in part and dissenting in part).

District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring in part and dissenting in part.

I agree with the Court that the United States proved that petitioner T. I. M. E.-D. C. was guilty of a pattern or practice of discriminating against blacks and Spanish-surnamed Americans in hiring line drivers. I also agree that incumbent minority-group employees who show that they applied for a line-driving job or that they would have applied but for the company's unlawful acts are presumptively entitled to the full measure of relief set forth in our decision last Term in *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976).[1] But I do not agree that Title VII permits petitioners to treat Negro and Spanish-surnamed line drivers differently from other drivers who were hired by the company at the same time simply because the former drivers were prevented by the company from acquiring seniority over the road. I therefore dissent

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[1] In stating that the task nonapplicants face in proving that they should be treated like applicants is "difficult," *ante*, at 364, I understand the Court simply to be addressing the facts of this case. There may well be cases in which the jobs that the nonapplicants seek are so clearly more desirable than their present jobs that proving that but for the employer's discrimination the nonapplicants previously would have applied will be anything but difficult.

Even in the present case, however, I believe the Court unnecessarily adds to the nonapplicants' burden. While I agree that proof of a nonapplicant's current willingness to accept a line-driver job is not dispositive of the question of whether the company's discrimination deterred the nonapplicant from applying in the past, I do not agree that current willingness "says little," see *ante*, at 371, about past willingness. In my view, we would do well to leave questions of this sort concerning the weight to be given particular pieces of evidence to the district courts, rather than attempting to resolve them through overly broad and ultimately meaningless generalizations.

from that aspect of the Court's holding, and from the limitations on the scope of the remedy that follow from it.

As the Court quite properly acknowledges, *ante*, at 349–350, the seniority provision at issue here clearly would violate Title VII absent § 703 (h), 42 U. S. C. § 2000e–2 (h), which exempts at least some seniority systems from the reach of the Act. Title VII prohibits an employer from "classify[ing] his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin." 42 U. S. C. § 2000e–2 (a)(2) (1970 ed., Supp. V). "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained *if they operate to 'freeze' the status quo of prior discriminatory employment practices.*" *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430 (1971) (emphasis added). Petitioners' seniority system does precisely that: it awards the choicest jobs and other benefits to those possessing a credential—seniority—which, due to past discrimination, blacks and Spanish-surnamed employees were prevented from acquiring. Consequently, "[e]very time a Negro worker hired under the old segregated system bids against a white worker in his job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias." *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F. 2d 980, 988 (CA5 1969) (Wisdom, J.), cert. denied, 397 U. S. 919 (1970).

As the Court also concedes, with a touch of understatement, "the view that § 703 (h) does not immunize seniority systems that perpetuate the effects of prior discrimination has much support." *Ante*, at 346 n. 28. Without a single dissent, six Courts of Appeals have so held in over 30 cases,[2] and two

[2] *Acha* v. *Beame*, 531 F. 2d 648 (CA2 1976); *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652 (CA2 1971); *Nance* v. *Union Carbide Corp.*, 540 F. 2d 718 (CA4 1976), cert. pending, Nos. 76–824, 76–838; *Patterson*

other Courts of Appeals have indicated their agreement, also without dissent.[3] In an unbroken line of cases, the Equal Employment Opportunity Commission has reached the same

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v. *American Tobacco Co.*, 535 F. 2d 257 (CA4), cert. denied, 429 U. S. 920 (1976); *Russell* v. *American Tobacco Co.*, 528 F. 2d 357 (CA4 1975), cert. denied, 425 U. S. 935 (1976); *Hairston* v. *McLean Trucking Co.*, 520 F. 2d 226 (CA4 1975); *United States* v. *Chesapeake & Ohio R. Co.*, 471 F. 2d 582 (CA4 1972), cert. denied *sub nom. Railroad Trainmen* v. *United States*, 411 U. S. 939 (1973); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (CA4), cert. dismissed, 404 U. S. 1006 (1971); *Griggs* v. *Duke Power Co.*, 420 F. 2d 1225 (CA4 1970), rev'd on other grounds, 401 U. S. 424 (1971); *Swint* v. *Pullman-Standard*, 539 F. 2d 77 (CA5 1976); *Sagers* v. *Yellow Freight System*, 529 F. 2d 721 (CA5 1976); *Sabala* v. *Western Gillette, Inc.*, 516 F. 2d 1251 (CA5 1975), cert. pending, Nos. 75–788, 76–1060; *Gamble* v. *Birmingham Southern R. Co.*, 514 F. 2d 678 (CA5 1975); *Resendiz* v. *Lee Way Motor Freight, Inc.*, 505 F. 2d 69 (CA5 1974); *Herrera* v. *Yellow Freight System, Inc.*, 505 F. 2d 66 (CA5 1974); *Carey* v. *Greyhound Bus Co.*, 500 F. 2d 1372 (CA5 1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211 (CA5 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364 (CA5 1974); *Bing* v. *Roadway Express, Inc.*, 485 F. 2d 441 (CA5 1973); *United States* v. *Georgia Power Co.*, 474 F. 2d 906 (CA5 1973); *United States* v. *Jacksonville Terminal Co.*, 451 F. 2d 418 (CA5 1971), cert. denied, 406 U. S. 906 (1972); *Long* v. *Georgia Kraft Co.*, 450 F. 2d 557 (CA5 1971); *Taylor* v. *Armco Steel Corp.*, 429 F. 2d 498 (CA5 1970); *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F. 2d 980 (CA5 1969), cert. denied, 397 U. S. 919 (1970); *EEOC* v. *Detroit Edison Co.*, 515 F. 2d 301 (CA6 1975), cert. pending, Nos. 75–220, 75–221, 75–239, 75–393; *Palmer* v. *General Mills, Inc.*, 513 F. 2d 1040 (CA6 1975); *Head* v. *Timken Roller Bearing Co.*, 486 F. 2d 870 (CA6 1973); *Bailey* v. *American Tobacco Co.*, 462 F. 2d 160 (CA6 1972); *Rogers* v. *International Paper Co.*, 510 F. 2d 1340 (CA8), summarily vacated and remanded, 423 U. S. 809 (1975); *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354 (CA8 1973); *Gibson* v. *Longshoremen*, 543 F. 2d 1259 (CA9 1976); *United States* v. *Navajo Freight Lines, Inc.*, 525 F. 2d 1318 (CA9 1975).

The leading case in this line is a District Court decision, *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (ED Va. 1968).

[3] *Bowe* v. *Colgate, Palmolive Co.*, 489 F. 2d 896 (CA7 1973); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245 (CA10 1970), cert. denied, 401 U. S. 954 (1971).

I agree with the Court, *ante*, at 346 n. 28, that the results in a large

conclusion.[4] And the overwhelming weight of scholarly opinion is in accord.[5] Yet for the second time this Term, see *General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976), a majority of this Court overturns the unanimous conclusion of the Courts of Appeals and the EEOC concerning the scope of Title VII. Once again, I respectfully disagree.

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number of the *Quarles* line of cases can survive today's decision. That the instant seniority system "is rational, in accord with the industry practice, . . . consistent with NLRB precedents[,] . . . did not have its genesis in racial discrimination, and . . . was negotiated and has been maintained free from any illegal purpose," *ante*, at 356, distinguishes the facts of this case from those in many of the prior decisions.

[4] CCH Empl. Prac. Guide (1976) ¶¶ 6481, 6448, 6441, 6400, 6399, 6395, 6382; CCH EEOC Decisions (1973) ¶¶ 6373, 6370, 6366, 6365, 6355, 6334, 6313, 6272, 6223, 6217, 6214, 6211, 6197, 6195, 6188, 6176, 6169, 6044.

[5] Blumrosen, Seniority & Equal Employment Opportunity: A Glimmer of Hope, 23 Rutgers L. Rev. 268 (1969); Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598 (1969); Fine: Plant Seniority and Minority Employees: Title VII's Effect on Layoffs, 47 U. Colo. L. Rev. 73 (1975); Gould, Seniority and the Black Worker: Reflections on Quarles and its Implications, 47 Texas L. Rev. 1039 (1969); Poplin, Fair Employment in a Depressed Economy: The Layoff Problem, 23 UCLA L. Rev. 177 (1975); S. Ross, Reconciling Plant Seniority with Affirmative Action and Anti-Discrimination, in New York University, Twenty-Eighth Annual Conference on Labor 231 (1976); Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1157–1164 (1971); Comment, Last Hired, First Fired Seniority, Layoffs, and Title VII: Questions of Liability and Remedy, 11 Colum. J. Law & Soc. Prob. 343 (1975); Note, The Problem of Last Hired, First Fired: Retroactive Seniority as a Remedy Under Title VII, 9 Ga. L. Rev. 611 (1975); Note, Last Hired, First Fired Layoffs and Title VII, 88 Harv. L. Rev. 1544 (1975); Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv. L. Rev. 1260 (1967); Comment, Title VII and Seniority Systems: Back to the Foot of the Line? 64 Ky. L. Rev. 114 (1975); Comment, Layoffs and Title VII: The Conflict Between Seniority and Equal Employment Opportunities, 1975 Wis. L. Rev. 791; 1969 Duke L. J. 1091; 46 N. C. L. Rev. 891 (1968).

I

Initially, it is important to bear in mind that Title VII is a remedial statute designed to eradicate certain invidious employment practices. The evils against which it is aimed are defined broadly: "to fail . . . to hire or to discharge . . . *or otherwise to discriminate* . . . with respect to . . . compensation, terms, conditions, or privileges of employment," and "to limit, segregate, or classify . . . *in any way* which would deprive *or tend to deprive* any individual of employment opportunities *or otherwise adversely affect his status.*" 42 U. S. C. § 2000e–2 (a) (1970 ed., Supp. V) (emphasis added). Section 703 (h) carves out an exemption from these broad prohibitions. Accordingly, under longstanding principles of statutory construction, the Act should "be given a liberal interpretation . . . [and] exemptions from its sweep should be narrowed and limited to effect the remedy intended." *Piedmont & Northern R. Co.* v. *ICC,* 286 U. S. 299, 311–312 (1932); see also *Spokane & Inland R. Co.* v. *United States,* 241 U. S. 344, 350 (1916); *United States* v. *Dickson,* 15 Pet. 141, 165 (1841) (Story, J.). Unless a seniority system that perpetuates discrimination falls "plainly and unmistakably within [the] terms and spirit" of § 703 (h), *A. H. Phillips, Inc.* v. *Walling,* 324 U. S. 490, 493 (1945), the system should be deemed unprotected. I submit that whatever else may be true of the section, its applicability to systems that perpetuate past discrimination is not "plainly and unmistakably" clear.

The language of § 703 (h) provides anything but clear support for the Court's holding. That section provides, in pertinent part:

> "[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority . . . system . . . *provided that such differences are not the result of an intention to*

discriminate because of race, color, religion, sex, or national origin . . . ." (Emphasis added.)

In this case, however, the different "privileges of employment" for Negroes and Spanish-surnamed Americans, on the one hand, and for all others, on the other hand, produced by petitioners' seniority system are precisely the result of prior, intentional discrimination in assigning jobs; but for that discrimination, Negroes and Spanish-surnamed Americans would not be disadvantaged by the system. Thus, if the proviso is read literally, the instant case falls squarely within it, thereby rendering § 703 (h) inapplicable. To avoid this result the Court is compelled to reconstruct the proviso to read: provided that such a seniority system "did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose." *Ante*, at 356.

There are no explicit statements in the legislative history of Title VII that warrant this radical reconstruction of the proviso. The three documents placed in the Congressional Record by Senator Clark concerning seniority all were written many weeks before the Mansfield-Dirksen amendment containing § 703 (h) was introduced. Accordingly, they do not specifically discuss the meaning of the proviso.[6] More im-

[6] The three documents, quoted in full in *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 759–761, nn. 15–16 (1976), and in substantial part in today's decision, *ante*, at 350–351, and n. 36, are (1) the Clark-Case Interpretive Memorandum, 110 Cong. Rec. 7212–7215 (1964); (2) the Justice Department Reply to Arguments Made by Senator Hill, *id.*, at 7207; and (3) Senator Clark's Response to the Dirksen Memorandum, *id.*, at 7216–7218. They were all placed in the Congressional Record of April 8, 1964, but were not read aloud during the debates. The Mansfield-Dirksen amendment was presented by Senator Dirksen on May 26, 1964. *Id.*, at 11926.

A few general statements also were made during the course of the debates concerning Title VII's impact on seniority, but these statements add nothing to the analysis contained in the documents. See *id.*, at 1518 (Rep. Cellar); *id.*, at 6549, 11848 (Sen. Humphrey); *id.*, at 6563–6564

portantly, none of the documents addresses the general problem of seniority systems that perpetuate discrimination. Not surprisingly, Congress simply did not think of such subtleties in enacting a comprehensive, pathbreaking Civil Rights Act.[7] To my mind, this is dispositive. Absent unambiguous statutory language or an authoritative statement in the legislative history legalizing seniority systems that continue past wrongs, I do not see how it can be said that the § 703 (h) exemption "plainly and unmistakably" applies.

II

Even if I were to agree that this case properly can be decided on the basis of inferences as to Congress' intent, I still could not accept the Court's holding. In my view, the legislative history of the 1964 Civil Rights Act does not support the conclusion that Congress intended to legalize seniority systems that perpetuate discrimination, and administrative and legislative developments since 1964 positively refute that conclusion.

A

The Court's decision to uphold seniority systems that perpetuate post-Act discrimination—that is, seniority systems that treat Negroes and Spanish-surnamed Americans who become line drivers as new employees even though, after the effective date of Title VII, these persons were discriminatorily assigned to city-driver jobs where they accumulated seniority—is explained in a single footnote. *Ante*, at 348 n. 30. That footnote relies almost entirely on *United Air Lines, Inc.*

(Sen. Kuchel); *id.*, at 9113 (Sen. Keating); *id.*, at 15893 (Rep. McCulloch).

[7] In amending Title VII in 1972, Congress acknowledged its own prior naiveté:

"In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. . . . Experience has shown this view to be false." S. Rep. No. 92-415, p. 5 (1971).

See H. R. Rep. No. 92-238, p. 8 (1971).

v. *Evans*, *post*, p. 553. But like the instant decision, *Evans* is devoid of any analysis of the legislative history of § 703 (h); it simply asserts its conclusion in a single paragraph. For the Court to base its decision here on the strength of *Evans* is sheer bootstrapping.

Had the Court objectively examined the legislative history, it would have been compelled to reach the opposite conclusion. As we stated just last Term, "it is apparent that the thrust of [§ 703 (h)] is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination *occurring prior to the effective date of the Act.*"[8] *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 761 (emphasis added). Congress was concerned with seniority expectations that had developed prior to the enactment of Title VII, not with expectations arising thereafter to the extent that those expectations were dependent on whites benefiting from unlawful discrimination. Thus, the paragraph of the Clark-Case Interpretive Memorandum dealing with seniority systems begins:

> "Title VII would have no effect on established seniority rights. *Its effect is prospective and not retrospective.*" 110 Cong. Rec. 7213 (1964) (emphasis added).

Similarly, the Justice Department memorandum that Senator Clark introduced explains:

> "Title VII would have no effect on seniority rights existing *at the time it takes effect.* If, for example a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected . . . by title VII. This

[8] This understanding of § 703 (h) underlies *Franks'* holding that constructive seniority is the presumptively correct remedy for discriminatory refusals to hire, even though awarding such seniority necessarily disrupts the expectations of other employees.

> would be true even in the case where *owing to discrimination prior to the effective date of the title,* white workers had more seniority than Negroes . . . . Any differences in treatment based on *established* seniority rights would not be based on race and would not be forbidden by the title." *Id.*, at 7207 (emphasis added).

Finally, Senator Clark's prepared answers to questions propounded by Senator Dirksen stated:

> "Question. If an employer is directed to abolish his employment list because of discrimination what happens to seniority?
>
> "Answer. *The bill is not retroactive,* and it will not require an employer to change existing seniority lists." *Id.*, at 7217 (emphasis added).

For the Court to ignore this history while reaching a conclusion contrary to it is little short of remarkable.

B

The legislative history of § 703 (h) admittedly affords somewhat stronger support for the Court's conclusion with respect to seniority systems that perpetuate pre-Act discrimination—that is, seniority systems that treat Negroes and Spanish-surnamed Americans who become line drivers as new employees even though these persons were discriminatorily assigned to city-driver jobs where they accumulated seniority before the effective date of Title VII. In enacting § 703 (h), Congress intended to extend at least some protection to seniority expectations that had developed prior to the effective date of the Act. But the legislative history is very clear that the only threat to these expectations that Congress was seeking to avert was nonremedial, fictional seniority. Congress did not want minority group members who were hired after the effective date of the Act to be given superseniority simply because they were members of minority groups, nor did it want the use of seniority to be invalidated whenever it had a disparate

impact on newly hired minority employees. These are the evils—and the only evils—that the opponents of Title VII raised [9] and that the Clark-Case Interpretive Memorandum addressed.[10] As the Court acknowledges, "there seems to be no explicit reference in the legislative history to pre-Act discriminatees already employed in less desirable jobs." *Ante*, at 354.

Our task, then, assuming still that the case properly can be decided on the basis of imputed legislative intent, is "to put to ourselves the question, which choice is it the more likely that Congress would have made," *Burnet* v. *Guggenheim*, 288

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[9] The most detailed attack on Title VII's effect on seniority rights was voiced in the minority report to the House Judiciary Committee Report, H. R. Rep. No. 914, 88th Cong., 1st Sess. (1963):

"The provisions of this act grant the power to destroy union seniority. . . . [T]he extent of actions which would be taken to destroy the seniority system is unknown and unknowable.

". . . Under the power granted in this bill, if a carpenters' hiring hall, say, had 20 men awaiting call, the first 10 in seniority being white carpenters, the union could be forced to pass them over in favor of carpenters beneath them in seniority, but of the stipulated race." *Id.*, at 71 (emphasis in original).

The Senate opponents of the bill who discussed its effects on workers generally followed this line, although the principal argument advanced in the Senate was that Title VII would require preferential hiring of minorities. See 110 Cong. Rec. 487 (1964) (Sen. Hill); *id.*, at 7091 (Sen. Stennis); *id.*, at 7878 (Sen. Russell).

[10] The Clark-Case Memorandum states:

"Title VII would have no effect on established seniority rights. . . . Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers." *Id.*, at 7213.

The remaining documents, see n. 6, *supra*, while phrased more generally, are entirely consistent with the focus of Senators Clark and Case.

U. S. 280, 285 (1933) (Cardozo, J.), had it focused on the problem: would it have validated or invalidated seniority systems that perpetuate pre-Act discrimination? To answer that question, the devastating impact of today's holding validating such systems must be fully understood. Prior to 1965 blacks and Spanish-surnamed Americans who were able to find employment were assigned the lowest paid, most menial jobs in many industries throughout the Nation but especially in the South. In many factories, blacks were hired as laborers while whites were trained and given skilled positions; [11] in the transportation industry blacks could only become porters; [12] and in steel plants blacks were assigned to the coke ovens and blasting furnaces, "the hotter and dirtier" places of employment.[13] The Court holds, in essence, that while after 1965 these incumbent employees are entitled to an equal opportunity to advance to more desirable jobs, to take advantage of that opportunity they must pay a price: they must surrender the seniority they have accumulated in their old jobs. For many, the price will be too high, and they will be locked into their previous positions.[14] Even those willing to pay the price will

[11] *E. g., Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364 (CA5 1974); *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354 (CA8 1973); *Griggs* v. *Duke Power Co.*, 420 F. 2d 1225 (CA4 1970).

[12] *E. g., Carey* v. *Greyhound Bus Co.*, 500 F. 2d 1372 (CA5 1974); *United States* v. *Jacksonville Terminal Co.*, 451 F. 2d 418 (CA5 1971).

[13] *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d, at 655.

[14] This "lock-in" effect explains why, contrary to the Court's assertion, *ante*, at 354, there *is* a "rational basis for distinguishing . . . claims [of persons already employed in less desirable jobs] from those of persons initially denied *any* job." Although denying constructive seniority to the latter group will prevent them from assuming the position they would have occupied but for the pre-Act discrimination, it will not deter them from moving into higher paying jobs.

In comparing incumbent employees with pre-Act discriminatees who were refused jobs, however, the Court assumes that § 703 (h) must mean that the latter group need not be given constructive seniority if they are later hired. The only clear effect of § 703 (h), however, is to prevent

have to reconcile themselves to being forever behind subsequently hired whites who were not discriminatorily assigned. Thus equal opportunity will remain a distant dream for all incumbent employees.

I am aware of nothing in the legislative history of the 1964 Civil Rights Act to suggest that if Congress had focused on this fact it nonetheless would have decided to write off an entire generation of minority-group employees. Nor can I believe that the Congress that enacted Title VII would have agreed to postpone for one generation the achievement of economic equality. The backers of that Title viewed economic equality as both a practical necessity and a moral imperative.[15] They were well aware of the corrosive impact employment discrimination has on its victims, and on society generally.[16] They sought, therefore, "to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens"; *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800 (1973); see also *Griggs* v. *Duke Power Co.*, 401 U. S., at 429–431; *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974); and "to make persons whole for injuries suffered on account of unlawful employment discrimination," *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 418 (1975). In

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persons who were *not* discriminated against from obtaining special seniority rights because they are members of minority groups. See *supra*, at 385–386, and n. 10. Although it is true, as the Court notes, *ante*, at 354–355, n. 40, that in *Quarles* and *United Papermakers* the courts concluded that persons refused jobs prior to the Act need not be given fictional seniority, the EEOC, CCH EEOC Decisions (1973) ¶ 6217, and several commentators, *e. g.*, Cooper & Sobol, *supra*, n. 5; Note, *supra*, n. 5, 88 Harv. L. Rev., at 1544, have rejected this conclusion, and more recent decisions have questioned it, *e. g.*, *Watkins* v. *Steel Workers*, 516 F. 2d 41 (CA5 1975).

[15] See, *e. g.*, 110 Cong. Rec. 6547 (1964) (remarks of Sen. Humphrey); *id.*, at 6562 (remarks of Sen. Kuchel); *id.*, at 7203–7204 (remarks of Sen. Clark); H. R. Rep. No. 914, Pt. 2, 88th Cong., 1st Sess., 26–29 (1963).

[16] See sources cited in n. 15, *supra*.

short, Congress wanted to enable black workers to assume their rightful place in society.

It is, of course, true that Congress was not willing to invalidate seniority systems on a wholesale basis in pursuit of that goal.[17] But the United States, as the plaintiff suing on behalf of the incumbent minority group employees here, does not seek to overturn petitioners' seniority system. It seeks only to have the "time actually worked in [minority group] jobs [recognized] as the equal of [the majority group's] time," *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F. 2d, at 995, within the existing seniority system. Admittedly, such recognition would impinge on the seniority expectations white employees had developed prior to the effective date of the Act. But in enacting Title VII, Congress manifested a willingness to do precisely that. For example, the Clark-Case Interpretive Memorandum, see n. 6, *supra*, makes clear that Title VII prohibits unions and employers from using discriminatory waiting lists, developed prior to the effective date of the Title, in making selections for jobs or training programs after that date. 110 Cong. Rec. 7213 (1964). Such a prohibition necessarily would disrupt the expectations of those on the lists. More generally, the very fact that Congress made Title VII effective shortly after its enactment demonstrates that expectations developed prior to passage of the Act were not considered sacrosanct, since Title VII's general ban on employment discrimination inevitably interfered with the pre-existing expectations of whites who anticipated benefiting from continued discrimination. Thus I am in complete agreement with Judge Butzner's conclusion

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[17] As one commentator has stated:

"[T]he statute conflicts with itself. While on the one hand Congress did wish to protect established seniority rights, on the other it intended to expedite black integration into the economic mainstream and to end, once and for all, the *de facto* discrimination which replaced slavery at the end of the Civil War." Poplin, *supra*, n. 5, at 191.

in his seminal decision in *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505, 516 (ED Va. 1968): "It is . . . apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act." [18]

C

If the legislative history of § 703 (h) leaves any doubt concerning the section's applicability to seniority systems that perpetuate either pre- or post-Act discrimination, that doubt is entirely dispelled by two subsequent developments. The Court all but ignores both developments; I submit they are critical.

First, in more than a score of decisions beginning at least as early as 1969, the Equal Employment Opportunity Commission has consistently held that seniority systems that perpetuate prior discrimination are unlawful.[19] While the Court may have retreated, see *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 141–142 (1976), from its prior view that the interpretations of the EEOC are " 'entitled to great deference,' " *Albemarle Paper Co.* v. *Moody*, *supra*, at 431, quoting *Griggs*

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[18] See also Gould, *supra*, n. 5, at 1042:

"If Congress intended to bring into being an integrated work force, . . . and not merely to create a paper plan meaningless to Negro workers, the only acceptable legislative intent on past discrimination is one that requires unions and employers to root out the past discrimination embodied in presently nondiscriminatory seniority arrangements so that black and white workers have equal job advancement rights."

[19] See cases cited in n. 4, *supra*.

The National Labor Relations Board has reached a similar conclusion in interpreting the National Labor Relations Act, 29 U. S. C. § 151 *et seq.* In *Local 269, Electrical Workers*, 149 N. L. R. B. 769 (1964), enforced, 357 F. 2d 51 (CA3 1966), the Board held that a union hiring hall commits present acts of discrimination when it makes referrals based on experience if, in the past, the union has denied nonunion members the opportunity to develop experience. See also *Houston Maritime Assn.*, 168 N. L. R. B. 615 (1967), enforcement denied, 426 F. 2d 584 (CA5 1970).

v. *Duke Power Co., supra,* at 434, I have not. Before I would sweep aside the EEOC's consistent interpretation of the statute it administers, I would require " 'compelling indications that it is wrong.' " *Espinoza* v. *Farah Mfg. Co.,* 414 U. S. 86, 94–95 (1973), quoting *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 381 (1969). I find no such indications in the Court's opinion.

Second, in 1972 Congress enacted the Equal Employment Opportunity Act of 1972, Pub. L. 92–261, 86 Stat. 103, amending Title VII. In so doing, Congress made very clear that it approved of the lower court decisions invalidating seniority systems that perpetuate discrimination. That Congress was aware of such cases is evident from the Senate and House Committee Reports which cite the two leading decisions, as well as several prominent law review articles. S. Rep. No. 92–415, p. 5 n. 1 (1971); H. R. Rep. No. 92–238, p. 8 n. 2 (1971). Although Congress took action with respect to other lower court opinions with which it was dissatisfied,[20] it made no attempt to overrule the seniority cases. To the contrary, both the Senate and House Reports expressed approval of the "perpetuation principle" as applied to seniority systems[21] and

[20] For example, the 1972 Act added to the definitional section of Title VII, 42 U. S. C. § 2000e (1970 ed., Supp. V), a new subsection (j) defining "religion" to include "religious observance and practice, as well as belief." This subsection was added "to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in *Dewey* v. *Reynolds Metal Company,* 429 F. 2d [324] (6th Cir. 1970), *Affirmed by an equally divided court,* 402 U. S. 689 (1971)." 118 Cong. Rec. 7167 (1972) (Section-by-Section Analysis of H. R. 1746, the Equal Employment Opportunity Act of 1972, prepared by Sens. Williams and Javits). *Dewey* had questioned the authority of the EEOC to define "religion" to encompass religious practices. *Dewey* v. *Reynolds Metals Co.,* 429 F. 2d 324, 331 n. 1, 334–335 (CA6 1970).

[21] After acknowledging the naive assumptions of the 1964 Civil Rights Act, see n. 7, *supra,* both Committee Reports went on to state:

"Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now gen-

invoked the principle to justify the Committees' recommendations to extend Title VII's coverage to state and local government employees,[22] and to expand the powers of the EEOC.[23] Moreover, the Section-by-Section Analysis of the

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erally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, [and] perpetuation of the present effect of pre-act discriminatory practices through various institutional devices . . . . In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful." S. Rep. No. 92–415, p. 5 (1971).

See H. R. Rep. No. 92–238, p. 8 (1971).

In addition, in discussing "pattern or practice" suits and the recommendation to transfer the power to bring them to the EEOC, the House Report singled out several seniority cases, including *United Papermakers*, as examples of suits that "have contributed significantly to the Federal effort to combat employment discrimination." H. R. Rep. No. 92–238, *supra*, at 13, and n. 4.

It is difficult to imagine how Congress could have better "address[ed] the specific issue presented by this case," *ante*, at 354 n. 39, than by referring to "the mechanics of seniority . . . [and] perpetuation of the present effect of pre-act discriminatory practices" and by citing *Quarles* and *United Papermakers*.

[22] Both Reports stated that state and local governments had discriminated in the past and that "the existence of discrimination is perpetuated by both institutional and overt discriminatory practices . . . [such as] *de facto* segregated job ladders." S. Rep. No. 92–415, *supra*, at 10; H. R. Rep. No. 92–238, *supra*, at 17. The same points were made in the debate in the House and Senate. 118 Cong. Rec. 1815 (1972) (remarks of Sen. Williams); 117 Cong. Rec. 31961 (1971) (remarks of Rep. Perkins).

[23] The Senate Report stated:

"It is expected that through the administrative process, the Commission will continue to define and develop the approaches to handling serious problems of discrimination that are involved in the area of employment . . . (including seniority systems)." S. Rep. No. 92–415, *supra*, at 19.

The House Report argued:

"Administrative tribunals are better equipped to handle the complicated

Conference Committee bill, which was prepared and placed in the Congressional Record by the floor managers of the bill, stated in "language that could hardly be more explicit," *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 765 n. 21, that, "in any areas where a specific contrary intention is not indicated, it was assumed that the present case law . . . would continue to govern the applicability and construction of Title VII." 118 Cong. Rec. 7166, 7564 (1972). And perhaps most important, in explaining the section of the 1972 Act that empowers the EEOC "to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e–2 or 2000e–3," 42 U. S. C. § 2000e–5 (a) (1970 ed., Supp. V), the Section-by-Section Analysis declared:

> "The unlawful employment practices encompassed by sections 703 and 704 which were enumerated in 1964 by the original Act, *and as defined and expanded by the courts*, remain in effect." 118 Cong. Rec. 7167, 7564 (1972) (emphasis added).[24]

We have repeatedly held: "When several acts of Congress are passed touching the same subject matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309 (1911); see *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 275 (1974) (subsequent legisla-

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issues involved in employment discrimination cases. . . . Issues that have perplexed courts include plant-wide restructuring of pay-scales and progression lines, seniority rosters and testing." H. R. Rep. No. 92–238, *supra*, at 10.

[24] By enacting a new section defining the EEOC's powers with reference to §§ 703 and 704 of the 1964 Act, Congress in 1972 effectively re-enacted those sections, and the judicial gloss that had been placed upon them. See 2A C. Sands, Sutherland's Statutes and Statutory Construction § 49.10 (1973) and cases cited; cf. *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 414 n. 8 (1975) (finding that re-enactment in 1972 of backpay provision of 1964 Act "ratified" Courts of Appeals decisions awarding backpay to unnamed class members who had not filed charges with the EEOC).

tion entitled to "significant weight"); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S., at 380; *United States* v. *Stafoff*, 260 U. S. 477, 480 (1923) (Holmes, J.); *New York & Norfolk R. Co.* v. *Peninsula Produce Exchange*, 240 U. S. 34, 39 (1916) (Hughes, J.); *United States* v. *Weeks*, 5 Cranch 1, 8 (1809). Earlier this Term, we implicitly followed this canon in using a statute passed in 1976 to conclude that the Administrative Procedure Act, 5 U. S. C. §§ 701–706, enacted in 1946, was not intended as an independent grant of jurisdiction to the federal courts. *Califano* v. *Sanders*, 430 U. S. 99 (1977). The canon is particularly applicable here for two reasons. First, because there is no explicit legislative history discussing seniority systems that perpetuate discrimination, we are required to "'[seize] every thing from which aid can be derived . . .'" *Brown* v. *GSA*, 425 U. S. 820, 825 (1976), quoting, *United States* v. *Fisher*, 2 Cranch 358, 386 (1805), if we are to reconstruct congressional intent. Second, because petitioners' seniority system was readopted in collective-bargaining agreements signed after the 1972 Act took effect, any retroactivity problems that ordinarily inhere in using a later Act to interpret an earlier one are not present here. Cf. *Stockdale* v. *Insurance Cos.*, 20 Wall. 323, 331–332 (1874). Thus, the Court's bald assertion that the intent of the Congress that enacted the 1972 Act is "entitled to little if any weight," *ante*, at 354 n. 39, in construing § 703 (h) is contrary to both principle and precedent.

Only last Term, we concluded that the legislative materials reviewed above "completely [answer] the argument that Congress somehow intended seniority relief to be less available" than backpay as a remedy for discrimination. *Franks* v. *Bowman Transportation Co.*, *supra*, at 765 n. 21. If anything, the materials provide an even more complete answer to the argument that Congress somehow intended to immunize seniority systems that perpetuate past discrimination. To the extent that today's decision grants immunity to such systems, I respectfully dissent.

Syllabus

EAST TEXAS MOTOR FREIGHT SYSTEM, INC. *v.* RODRIGUEZ ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-718. Argued January 10-11, 1977—Decided May 31, 1977*

Respondents, Mexican-Americans, brought suit against petitioners, their unions and their employer, a common carrier that employs city and over-the-road ("line") drivers, claiming that their rejection for line-driver jobs under the company's "no-transfer" policy in conjunction with the discriminatory effect of the seniority system applicable under collective-bargaining agreements between the company and the unions was racially and ethnically discriminatory and violated Title VII of the Civil Rights Act of 1964. Although respondents alleged that the case was a class action brought on behalf of the named plaintiffs and all Negroes and Mexican-Americans who had been denied equal employment opportunities with the company because of their race or national origin, they did not make a pretrial motion pursuant to Fed. Rule Civ. Proc. 23 to have the action certified as a class action, and the District Court made no such certification. Respondents had stipulated before trial that they had not been discriminated against when they were first hired and that the only issue before the court was whether the company's failure to consider respondents' line-driver applications violated Title VII, and their evidence and arguments at trial were confined to respondents' individual claims, with petitioners' defense showing that respondents were not qualified to be line drivers. The District Court following trial dismissed the class-action allegations (stressing respondents' failure to move for class certification, their focus on individual claims, the lack of evidence, the stipulation, and the fact that a large majority of the union membership had recently rejected a proposal for the merger of

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*Together with No. 75-651, *Teamsters Local Union 657* v. *Rodriguez et al.*; *Teamsters Local Union 657* v. *Herrera et al.*; and *Teamsters Local Union 657* v. *Resendis et al.* (see this Court's Rule 23 (5)); and No. 75-715, *Southern Conference of Teamsters* v. *Rodriguez et al.*; *Southern Conference of Teamsters* v. *Herrera et al.*; and *Southern Conference of Teamsters* v. *Resendis et al.* (see this Court's Rule 23 (5)), also on certiorari to the same court.

city-driver and line-driver seniority lists with free transfer between jobs), and the individual claims (ruling that the challenged policies were neutrally applied, were proper business policies, and that respondents lacked line-driver qualifications). The Court of Appeals reversed, discounting respondents' failure to move for certification ("a responsibility [that] falls to the court"), and the court itself certifying the class, after which it found classwide company and union liability on the basis of the proof adduced at trial. The trial court lack-of-qualification finding was not disturbed, the Court of Appeals ruling only that it was "premature" because each plaintiff as a member of the class would be entitled to have his application considered on the merits when future line-driver vacancies arose. *Held:* The Court of Appeals plainly erred in certifying a class action and in imposing classwide liability on petitioners. Pp. 403–406.

(a) The trial court proceedings made clear that respondents were not members of the class of discriminatees that they purported to represent, since there was abundant evidence that they were unqualified to be line drivers, which, in addition to the stipulation of each named plaintiff that he had not been discriminated against with respect to his initial employment, made them ineligible to represent a class of persons who did allegedly suffer injury or to attack the no-transfer rule and seniority system on the ground that these practices perpetuated past discrimination and locked minorities into the less desirable jobs to which they had been discriminatorily assigned. Pp. 403–404.

(b) The named plaintiffs' failure to protect the interest of class members by moving for certification strongly implies the inadequacy of the representation class members might receive. P. 405.

(c) The union vote against merging city-driver and line-driver seniority lists was at odds with respondents' demand for such a merger. P. 405.

505 F. 2d 40 (Nos. 75–718, 75–651, and 75–715); 505 F. 2d 66 and 69 (Nos. 75–651 and 75–715), vacated and remanded.

STEWART, J., delivered the opinion for a unanimous Court.

Richard C. Hotvedt argued the cause for petitioner in No. 75–718. With him on the briefs were *Harry A. Rissetto, George E. Seay, William C. Strock,* and *Theo F. Weiss. Edward W. Penshorn* argued the cause and filed a brief for petitioner in No. 75–651. *G. William Baab* argued the cause

for petitioner in No. 75–715. With him on the briefs were *David Previant* and *L. N. D. Wells, Jr.*

Vilma S. Martinez argued the cause for respondents Rodriguez et al. in all cases. With her on the brief were *Joel G. Contreras, Morris J. Baller,* and *James M. Heidelberg, Jr. Reuben Montemayor* argued the cause for respondents Herrera et al. in Nos. 75–651 and 75–715. With him on the brief was *Harry A. Nass, Jr.*†

MR. JUSTICE STEWART delivered the opinion of the Court.

These cases, like *Teamsters* v. *United States, ante,* p. 324, involve alleged employment discrimination on the part of an employer and unions in the trucking industry. The employer, East Texas Motor Freight System, Inc., is a common carrier that employs city and over-the-road, or "line," truckdrivers. The company has a "no-transfer" policy, prohibiting drivers from transferring between terminals or from city-driver to line-driver jobs.[1] In addition, under the applicable collective-bargaining agreements between the company and the unions, competitive seniority runs only from the date an employee enters a particular bargaining unit, so that a line driver's

†*Solicitor General Bork, Assistant Attorney General Pottinger,* and *Abner W. Sibal* filed a memorandum for the United States et al. as *amici curiae* in all cases. Briefs of *amici curiae* in all cases were filed by *Michael A. Warner, Robert E. Williams,* and *Douglas S. McDowell* for the Equal Employment Advisory Council; and by *Jack Greenberg, O. Peter Sherwood, Barry L. Goldstein,* and *Eric Schnapper* for the NAACP Legal Defense and Educational Fund, Inc. *Stephen J. Pollak, John D. Aldock,* and *John Townsend Rich* filed a brief for the National Railway Labor Conference as *amicus curiae* in Nos. 75–651 and 75–715.

[1] Under this policy a city driver must resign his job and forfeit all seniority in order to be eligible for a line-driver job. He gets no priority over other line-driver applicants by virtue of formerly having been with the company, and if he fails to become a line driver he is not automatically entitled to be restored to his city job.

competitive seniority does not take into account any time he may have spent in other jobs with the company.[2]

The respondents brought this suit against the company and the unions in a Federal District Court, challenging the above practices. Although their complaint denominated the cause as a class action, they did not move for class certification in the trial court. After a two-day hearing the court dismissed the class allegations of the complaint and decided against the individual respondents on the merits. The Court of Appeals for the Fifth Circuit reversed, after itself certifying what it considered an appropriate class and holding that the no-transfer rule and the seniority system violated the statutory rights of that class under 42 U. S. C. § 1981 and Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. V). 505 F. 2d 40. This Court granted certiorari to review the judgment of the Court of Appeals. 425 U. S. 990.

I

The respondents are three Mexican-Americans who initiated this litigation as the named plaintiffs, Jesse Rodriguez, Sadrach Perez, and Modesto Herrera. They were employed as city drivers at the company's San Antonio terminal, and were members of Teamsters Local Union 657 and of the Southern Conference of Teamsters. There was no line-driver operation at the San Antonio terminal, and the respondents stipulated that they had not been discriminated against when they were first hired. In August 1970, some years after they were hired, each of them applied in writing for a line-driver job. In accord with its no-transfer policy, the company declined to consider these applications on their individual merits. The respondents then filed complaints with the Equal Employment Opportunity Commission, and after receiving

[2] For a fuller description of a similar seniority system, see *Teamsters* v. *United States*, *ante*, at 343–344.

"right to sue" letters from the Commission, see 42 U. S. C. § 2000e–5 (e), they brought this lawsuit.

According to the complaint, the suit was brought on behalf of the named plaintiffs and all Negroes and Mexican-Americans who had been denied equal employment opportunities with the company because of their race or national origin. The complaint specifically alleged that the appropriate class should consist of all "East Texas Motor Freight's Mexican-American and Black in-city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas. Additionally that such class should properly be composed of all Mexican-American and Black applicants for line driver positions with East Texas Motor Freight . . . from July 2, 1965 [the effective date of Title VII] to present." [3]

Despite the class allegations in their complaint, the plaintiffs did not move prior to trial to have the action certified as a class action pursuant to Fed. Rule Civ. Proc. 23, and no such certification was made by the District Judge. Indeed, the plaintiffs had stipulated before trial that "'the only issue presently before the Court pertaining to the company is whether the failure of the Defendant East Texas Motor

[3] In addition to attacking the legality of the company's no-transfer and seniority policies, the complaint charged that the company excluded Negroes and Mexican-Americans from line-driver jobs, and that it had discharged plaintiff Perez and harassed plaintiff Rodriguez in retaliation for their having filed charges with the EEOC. The Southern Conference of Teamsters and Teamsters Local 657 were charged with participating in the exclusion of minority persons from line-driver jobs, acquiescing in the company's other discriminatory practices, and entering into collective-bargaining agreements that perpetuated the discrimination against Mexican-Americans and Negroes and erected "dual lines of seniority." In addition to other relief, the plaintiffs demanded that the company "merge its line-driver and city-driver seniority lists so as to provide for a singular seniority system based solely on an employee's anniversary date with the company."

Freight to consider Plaintiffs' line driver applications constituted a violation of Title VII and 42 U. S. C. § 1981.'" App. 82. And the plaintiffs confined their evidence and arguments at trial to their individual claims. The defendants responded accordingly, with much of their proof devoted to showing that Rodriguez, Perez, and Herrera were not qualified to be line drivers.

Following trial, the District Court dismissed the class-action allegations. It stressed the plaintiffs' failure to move for a prompt determination of the propriety of class certification, their failure to offer evidence on that question, their concentration at the trial on their individual claims, their stipulation that the only issue to be determined concerned the company's failure to act on their applications, and the fact that, contrary to the relief the plaintiffs sought, see n. 3, *supra*, a large majority of the membership of Local 657 had recently rejected a proposal calling for the merger of city-driver and line-driver seniority lists with free transfer between jobs.[4]

The District Court also held against the named plaintiffs on their individual claims. It ruled that the no-transfer policy and the seniority system were proper business practices, neutrally applied, and that the company had not discriminated against the plaintiffs or retaliated against them for filing charges with the EEOC. The court further found: "None of the plaintiff employees could satisfy all of the qualifications for a road driver position according to the company manual due to age or weight or driving record. . . . The driving, work, and/or physical records of the plaintiffs are of such nature that only casual consideration need be given to determine that the plaintiffs cannot qualify to become road drivers." App. 64.

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[4] The large majority of the members of Local 657 at the meeting that rejected the proposal were Mexican-American or Negro city drivers, negating any possibility that the vote was controlled by white persons or by line drivers.

The Court of Appeals for the Fifth Circuit reversed. With respect to the propriety of the class action, the appellate court discounted entirely the plaintiffs' failure to move for certification. Determination of the class nature of a suit, the court ruled, is a "responsibility [that] falls to the court." 505 F. 2d, at 50. Although the plaintiffs had acknowledged on appeal that only their individual claims had been tried, and had requested no more than that the case be remanded to the trial court for consideration of the class-action allegations, the Court of Appeals itself certified a class consisting of all of the company's Negro and Mexican-American city drivers covered by the applicable collective-bargaining agreements for the State of Texas. Stating that "the requirements of Rule 23 (a) must be read liberally in the context of suits brought under Title VII and Section 1981," *ibid.*, the court found that the named plaintiffs could " 'fairly and adequately protect the interests of the class.' " *Ibid.* The court minimized the antagonism between the plaintiffs and other city drivers with respect to the complaint's demand that seniority lists be merged, since "[t]he disagreement . . . concerned only the proper remedy; there was no antagonism with regard to the contention that the defendants practiced discrimination against the plaintiff class." *Id.*, at 51.[5]

After certifying the class, the Court of Appeals went on to find classwide liability against the company and the union on the basis of the proof adduced at the trial of the individual claims. Contrary to the understanding of the judge who had tried the case, the appellate court determined that the trial had proceeded "as in a class action," with the acquiescence of

[5] The court also stated that possible antagonism could be cured by tailoring the award of relief, but it did not suggest how such tailoring could be accomplished short of doing what it in fact did: awarding retroactive seniority to discriminatees and ignoring the named plaintiffs' separate demand that the seniority lines be merged.

the judge and the defendants. *Id.*, at 52.[6] The parties' stipulation that the only issue before the trial court concerned the company's failure to consider the named plaintiffs' applications for line-driver jobs was discounted as no more than "an attempt to eliminate some confusion in the exposition of evidence at trial." *Ibid.*

Accordingly, the Court of Appeals concluded, upon the trial record, that the company had discriminated against Negroes and Mexican-Americans in hiring line drivers, that the company's no-transfer rule and seniority system perpetuated the past discrimination and were not justified by business necessity, that the company's requirement of three years of immediately prior line-haul experience was an illegal employment qualification, and that the unions had violated Title VII and 42 U. S. C. § 1981 by "their role in establishing separate seniority rosters that failed to make allowance for minority city drivers who had been discriminatorily relegated to city driver jobs." 505 F. 2d, at 61. The Court of Appeals did not disturb the trial court's finding that none of the named plaintiffs was qualified to be a line driver; rather, it held only that that finding had been "premature," because each plaintiff, as a member of the class, would be entitled to have his application considered on the merits when future line-driver vacancies arose.[7]

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[6] The Court of Appeals apparently concluded on the basis of a colloquy appearing in the trial transcript that the parties and the trial judge understood the trial to concern the class claims as well as the individual claims. 505 F. 2d, at 52, and n. 14. This was contrary to the understanding of the trial judge as reflected in his findings. Moreover, as the full colloquy reveals, the trial judge ruled that evidence concerning general company practice would be admitted, not because of the class allegations, but only because it was probative with respect to the plaintiffs' individual claims.

[7] The Court of Appeals ordered that all class members be given an opportunity to transfer to line-driver jobs with retroactive seniority to be determined under the Fifth Circuit's "qualification date" principle. See *Teamsters* v. *United States*, *ante*, at 333.

II

It is our conclusion that on the record before it the Court of Appeals plainly erred in declaring a class action and in imposing upon the petitioners classwide liability. In arriving at this conclusion we do not reach the question whether a court of appeals should ever certify a class in the first instance. For it is inescapably clear that the Court of Appeals in any event erred in certifying a class in this case, for the simple reason that it was evident by the time the case reached that court that the named plaintiffs were not proper class representatives under Fed. Rule Civ. Proc. 23 (a).[8]

In short, the trial court proceedings made clear that Rodriguez, Perez, and Herrera were not members of the class of discriminatees they purported to represent. As this Court has repeatedly held, a class representative must be part of the class and "possess the same interest and suffer the same injury" as the class members. *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S. 208, 216. See, *e. g.*, *Kremens* v. *Bartley*, *ante*, at 131 n. 12; *Sosna* v. *Iowa*, 419 U. S. 393, 403; *Rosario* v. *Rockefeller*, 410 U. S. 752, 759 n. 9; *Hall* v. *Beals*, 396 U. S. 45, 49; *Bailey* v. *Patterson*, 369 U. S. 31, 32–33. The District Court found upon abundant evidence that these plaintiffs lacked the qualifications to be hired as line drivers.[9] Thus, they could have suffered no injury as a

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[8] Rule 23 (a) provides:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

[9] Jesse Rodriguez did not have prior over-the-road experience with a truck line. His record as a city driver included at least three accidents and at least five personal injuries. Modesto Herrera had been involved in at least three accidents and seven injuries, resulting in much time lost from

result of the alleged discriminatory practices, and they were, therefore, simply not eligible to represent a class of persons who did allegedly suffer injury. Furthermore, each named plaintiff stipulated that he had not been discriminated against with respect to his initial hire. In the light of that stipulation they were hardly in a position to mount a classwide attack on the no-transfer rule and seniority system on the ground that these practices perpetuated past discrimination and locked minorities into the less desirable jobs to which they had been discriminatorily assigned.

Apart from the named plaintiffs' evident lack of class membership, the record before the Court of Appeals disclosed at least two other strong indications that they would not

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work. He had received four warning letters from the company, of which three concerned abnormally low productivity. Sadrach Perez had been fired from his city-driver job by the time of suit. The District Court found that on occasion Perez had claimed to be totally and permanently disabled and had then returned to work, and that customers had complained of his disrespect and discourteousness. The company had placed at least four warning letters in his file before discharging him, referring to his failure to make deliveries, poor production, absence from work, and violation of instructions and company policy. More than 10 customers had notified the company that they would refuse freight if Perez was sent to deliver it and would refuse to give up freight if Perez was sent to receive it. An arbitration committee convened in connection with Perez' discharge had decided in the company's favor.

In light of this evidence, the District Court's finding that none of the respondents was qualified to be a line driver was not clearly erroneous. Nor was this finding in any way "premature." The trial had concerned the company's failure to consider the respondents' individual line-driver applications, and the plaintiffs had requested backpay and transfer with carryover seniority in addition to other relief. Even assuming, *arguendo*, that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event. See, *e. g.*, *Teamsters* v. *United States*, *ante*, at 369 n. 53. Cf. *Mt. Healthy City Board of Education* v. *Doyle*, 429 U. S. 274, 285–287.

"fairly and adequately protect the interests of the class." [10] One was their failure to move for class certification prior to trial. Even assuming, as a number of courts have held, that a district judge has an obligation on his own motion to determine whether an action shall proceed as a class action, see, *e. g., Senter* v. *General Motors Corp.*, 532 F. 2d 511, 520–521 (CA6); *Garrett* v. *City of Hamtramck*, 503 F. 2d 1236, 1243 (CA6); *Castro* v. *Beecher*, 459 F. 2d 725, 731 (CA1), the named plaintiffs' failure to protect the interests of class members by moving for certification surely bears strongly on the adequacy of the representation that those class members might expect to receive. See, *e. g., Nance* v. *Union Carbide Corp.*, 540 F. 2d 718, 722–725 (CA4), cert. pending, Nos. 76–828, 76–834; *Danner* v. *Phillips Petroleum Co.*, 447 F. 2d 159, 164 (CA5); *Beasley* v. *Kroehler Mfg. Co.*, 406 F. Supp. 926, 931 (ND Tex.); *Walker* v. *Columbia University*, 62 F. R. D. 63, 64 (SDNY); *Glodgett* v. *Betit*, 368 F. Supp. 211, 214 (Vt.); *Herbst* v. *Able*, 45 F. R. D. 451, 453 (SDNY). Another factor, apparent on the record, suggesting that the named plaintiffs were not appropriate class representatives was the conflict between the vote by members of the class rejecting a merger of the city- and line-driver collective-bargaining units,[11] and the demand in the plaintiffs' complaint for just such a merger. See, *e. g., Hansberry* v. *Lee*, 311 U. S. 32, 44–45.

We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representa-

[10] See Fed. Rule Civ. Proc. 23 (a), quoted in n. 8, *supra*.

[11] See *supra*, at 400.

tive of those who may have been the real victims of that discrimination.

For the reasons we have discussed, the District Court did not err in denying individual relief or in dismissing the class allegations of the respondents' complaint.[12] The judgment of the Court of Appeals is, accordingly, vacated, and the cases are remanded to that court for further proceedings consistent with this opinion.[13]

It is so ordered.

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[12] Obviously, a different case would be presented if the District Court had certified a class and only later had it appeared that the named plaintiffs were not class members or were otherwise inappropriate class representatives. In such a case, the class claims would have already been tried, and, provided the initial certification was proper and decertification not appropriate, the claims of the class members would not need to be mooted or destroyed because subsequent events or the proof at trial had undermined the named plaintiffs' individual claims. See, *e. g.*, *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 752–757; *Moss* v. *Lane Co.*, 471 F. 2d 853, 855–856 (CA4). Where no class has been certified, however, and the class claims remain to be tried, the decision whether the named plaintiffs should represent a class is appropriately made on the full record, including the facts developed at the trial of the plaintiffs' individual claims. At that point, as the Court of Appeals recognized in this case, "there [are] involved none of the imponderables that make the [class-action] decision so difficult early in litigation." 505 F. 2d, at 51. See also *Cox* v. *Babcock & Wilcox Co.*, 471 F. 2d 13, 15–16 (CA4).

[13] The union petitioners, in Nos. 75–651 and 75–715, also attack the judgments entered against them in *Herrera* v. *Yellow Freight System, Inc.*, 505 F. 2d 66 (CA5), and *Resendis* v. *Lee Way Motor Freight, Inc.*, 505 F. 2d 69 (CA5). The judgments against the unions in those related cases are also vacated, and the cases are remanded to the Court of Appeals for further consideration in light of this opinion and our opinion in *Teamsters* v. *United States*, *ante*, p. 324.

Syllabus

CONNOR ET AL. *v.* FINCH, GOVERNOR OF MISSISSIPPI, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 76–777. Argued February 28, 1977—Decided May 31, 1977*

1. The Federal District Court's legislative reapportionment plan for Mississippi's Senate and House of Representatives *held* not to embody the equitable discretion necessary to effectuate the standards of the Equal Protection Clause of the Fourteenth Amendment in that the plan failed to meet that Clause's most elemental requirement that legislative districts be "as nearly of equal population as is practicable." *Reynolds* v. *Sims*, 377 U. S. 533, 577. Pp. 413–421.

(a) A court is held to stricter standards than a state legislature in devising a legislative reapportionment plan, and "unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts, and, as well, must ordinarily achieve the goal of population equality with little more than *de minimis* variation." *Chapman* v. *Meier*, 420 U. S. 1, 26–27. Here, where the District Court's plan departed from the "population equality" norm in deference to Mississippi's historic respect for the integrity of county boundaries in conjunction with legislative districts, the resulting maximum population deviations of 16.5% in the Senate districts and 19.3% in the House districts cannot be characterized as *de minimis*. Pp. 414–417.

(b) "With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features," *Chapman* v. *Meier*, *supra*, at 26, and the District Court failed here to identify any such "unique features" of the Mississippi political structure as would permit a judicial protection of county boundaries in the teeth of the judicial duty to "achieve the goal of population equality with little more than *de minimis* variation." Pp. 417–420.

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*Together with No. 76–933, *Finch, Governor of Mississippi, et al.* v. *Connor et al.*; No. 76–934, *United States* v. *Finch, Governor of Mississippi, et al.*; and 76–935, *Connor et al.* v. *Finch, Governor of Mississippi, et al.*, also on appeal from the same court.

2. With respect to the claims that the District Court plan's reapportionment of some districts impermissibly dilutes Negro voting strength, the District Court on remand should either draw legislative districts that are reasonably contiguous and compact, so as to put to rest suspicions that Negro voting strength is being purposefully diluted, or explain precisely why in a particular instance that goal cannot be accomplished. Pp. 421–426.

Reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined, and in Parts I and II of which BURGER, C. J., and BLACKMUN, J., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, in which BURGER, C. J., joined, *post*, p. 426. POWELL, J., filed a dissenting opinion, *post*, p. 430. REHNQUIST, J., took no part in the consideration or decision of the cases.

Frank R. Parker argued the cause for appellants in Nos. 76–777 and 76–935 and appellees in No. 76–933. With him on the briefs were *Robert A. Murphy, Elizabeth R. Rindskopf,* and *William E. Caldwell.*

A. F. Summer, Attorney General of Mississippi, and *Jerris Leonard* argued the cause for appellees in Nos. 76–777, 76–934, and 76–935 and appellants in No. 76–933. With them on the briefs were *Giles W. Bryant,* Special Assistant Attorney General, and *William A. Allain.*

Deputy Solicitor General Wallace argued the cause for the United States in No. 76–934. With him on the briefs were *Acting Solicitor General Friedman, Assistant Attorney General Pottinger, Howard E. Shapiro, Brian K. Landsberg, John C. Hoyle,* and *Jessica Dunsay Silver.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The question in this litigation concerns the constitutional validity of a legislative reapportionment plan devised by a three-judge Federal District Court for Mississippi's Senate and House of Representatives. In Nos. 76–777 and 76–935, the

appellants are the Mississippi voters who originally brought this class action in the District Court. They challenge the court's entire Senate plan, and aspects of the House plan, as failing to meet the basic one-person, one-vote requirements of the Equal Protection Clause of the Fourteenth Amendment, and particularly the constitutional and equitable requirements of a court-ordered reapportionment plan.[1] In No. 76–934 the appellant is the Government, an intervenor in the District Court.[2] These appellants join in asserting that the District Court's plan works an impermissible dilution of Negro voting strength, and they challenge as well the District Court's decree for its failure to order special elections in all legislative districts where new or significantly stronger Negro voting majorities were created by the District Court's plan. In No. 76–933 the appellants are the state officers who were named as defendants in the District Court. These appellants assert that the District Court should have accorded greater deference to Mississippi's historic policy of respecting county boundaries and thus should have established multimember legislative districts, and they further assert that the court erred in ordering any special elections at all.

We do not reach all the complicated issues raised by the various appellants, because we have concluded that both the Senate and the House reapportionments ordered by the District Court fail to meet the most elemental requirement of the Equal Protection Clause in this area—that legislative dis-

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[1] These appellants also challenge the District Court's failure to award them reasonable attorneys' fees, as authorized by § 402 of the 1975 amendments to the Voting Rights Act of 1965, 42 U. S. C. § 1973*l* (e) (1970 ed., Supp. V), and the recent Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U. S. C. § 1988 (1976 ed.). Because we reverse and remand this cause for further proceedings, we do not resolve this problem, but simply instruct the District Court to make a determination of this question at an appropriate time in the proceedings on remand.

[2] The appellants in Nos. 76–777, 76–934, and 76–935 will sometimes hereinafter be referred to as the plaintiffs.

tricts be "as nearly of equal population as is practicable." *Reynolds* v. *Sims*, 377 U. S. 533, 577; *Chapman* v. *Meier*, 420 U. S. 1.

I

The effort to reapportion the Mississippi Legislature in accordance with constitutional requirements has occupied the attention of the federal courts for 12 years. This painfully protracted process of litigation began in the wake of *Reynolds* v. *Sims*, *supra*, when the appellants in No. 76–777 challenged in the District Court for the Southern District of Mississippi, the extreme population variances of the legislative apportionment that had been enacted by the state legislature in 1962. The District Court invalidated that plan. *Connor* v. *Johnson*, 256 F. Supp. 962.[3] After waiting for an ultimately unsuccessful attempt by the legislature to enact a constitutional reapportionment, the District Court then promulgated its own plan for the 1967 quadrennial elections, relying rather extensively on multimember districting in both legislative houses to achieve substantial population equality.[4] *Connor* v. *Johnson*, 265 F. Supp. 492.

In 1971, the state legislature enacted another apportionment; that legislation was held unconstitutional because the District Court could find no justification for the continuing substantial population variances among the various legislative districts. *Connor* v. *Johnson*, 330 F. Supp. 506. The court consequently formulated its own plan to govern the 1971 elections, continuing to rely extensively on multimember districts,[5] and failing altogether to formulate a final plan with

[3] Under the 1962 regime a majority of the House of Representatives could have been elected by some 40% of the State's voters; a majority of the Senate could have been elected by less than 38% of them. *Connor* v. *Johnson*, 256 F. Supp., at 976–977.

[4] Thirty-four of the 52 House districts and 10 of the 36 Senate districts were multimember districts under this court plan.

[5] Most of the House districts and almost half of the Senate districts were constituted as multimember districts under this plan. Thus 52 Senators

respect to the State's three largest counties—Hinds, Harrison, and Jackson. Those counties instead were given interim multimember representation. In an interlocutory appeal from that order, this Court pointed out that single-member districts are preferable to large multimember districts in court-ordered reapportionment plans, and accordingly stayed the judgment of the District Court and instructed it "absent insurmountable difficulties, to devise and put into effect a single-member district plan for Hinds County." [6] *Connor* v. *Johnson*, 402 U. S. 690, 692. The District Court found itself confronted by insurmountable difficulties, however, and did not divide Hinds County into single-member districts before the 1971 election. *Connor* v. *Johnson*, 330 F. Supp. 521.

On direct appeal, after the 1971 elections had taken place pursuant to the District Court's plan, this Court declined to consider the prospective validity of the 1971 plan in the continued absence of a final plan redistricting Hinds, Harrison, and Jackson Counties. *Connor* v. *Williams*, 404 U. S. 549. Relying on the District Court's stated intention to appoint a Special Master in January 1972 to consider the subdivision of those counties into single-member districts, we vacated the judgment and remanded with directions to the District Court that "[s]uch proceedings should go forward and be promptly concluded." *Id.*, at 551.

No Special Master was appointed. In anticipation of the 1975 elections, however, the Mississippi Legislature in April 1973 enacted a new apportionment. A hearing was not held on the plaintiffs' prompt objections to that legislation until February 1975. Before the District Court reached a decision,

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were to be elected from 33 senatorial districts, and 122 Members of the House of Representatives were to be elected from 46 House districts. *Connor* v. *Johnson*, 330 F. Supp., at 509–516.

[6] This Court was advised at that time that acceptable single-member district plans had been worked out for Hinds County, but not for Harrison or Jackson County. *Connor* v. *Johnson*, 402 U. S. 690.

however, the Mississippi Legislature enacted yet another apportionment almost identical to the 1971 court-ordered plan, but permanently adopting multimember districts for Hinds, Harrison, and Jackson Counties. The District Court ordered the filing of a new complaint addressing the 1975 legislation, and concluded that it was constitutional. *Connor* v. *Waller*, 396 F. Supp. 1308.[7] We reversed, holding that the legislative apportionment could not be effective as law until it had been submitted and had received clearance under § 5 of the Voting Rights Act of 1965, as amended, 42 U. S. C. § 1973c, and that the District Court had accordingly erred in considering its constitutional validity. *Connor* v. *Waller*, 421 U. S. 656.

In compliance with § 5 of the Voting Rights Act, Mississippi then submitted the 1975 legislation to the Attorney General of the United States. When he objected to the legislation,[8] the District Court proceeded to formulate another temporary reapportionment plan using multimember districts for the conduct of the 1975 elections. When the District Court delayed consideration of a permanent plan for the 1979 elections, this Court allowed the filing of a petition for a writ of mandamus to compel the District Court to enter a final judgment embodying a permanent reapportionment plan for

[7] The 1975 legislative plan contained 14 multimember districts for the Senate, and 24 multimember districts and 34 floterial districts and subdistricts for the House. (Floterial districts are a form of multimember districting in which one or more legislators are elected from subdistricts and one or more legislators are elected districtwide.) *Connor* v. *Waller*, 396 F. Supp., at 1324–1325, 1333–1339.

[8] On June 10, 1975, the Attorney General objected to the 1975 Acts reapportioning the House and Senate on the ground that Mississippi had failed to show that the legislation did not have the purpose and would not have the effect of denying or abridging the right to vote on account of race. The United States was subsequently permitted to intervene in the District Court as a party plaintiff. *Connor* v. *Finch*, 419 F. Supp. 1089, 1090–1091.

the Mississippi Legislature. *Connor* v. *Coleman*, 425 U. S. 675.[9] The District Court thereupon held hearings and entered a judgment adopting a final plan. See 419 F. Supp. 1072, 419 F. Supp. 1089, 422 F. Supp. 1014. We noted probable jurisdiction of these appeals challenging that judgment. 429 U. S. 1010 and 1060.

II

In approaching the task of devising a reapportionment plan for the 122-member House and 52-member Senate, the District Court announced certain guidelines to structure its analysis, drawn from previous cases in this court and other courts and from Mississippi policy. Population variances were to be as "near *de minimis* as possible"; districts were to be reasonably contiguous and compact; Negro voting strength would not be minimized or canceled; and every effort would be made to maintain the integrity of county lines.[10] The plaintiffs do not really challenge the criteria enunciated by the District Court, but rather argue that the court failed to abide by its criteria in putting together the reapportionment plans. The defend-

[9] This Court directed the District Court promptly to bring this case to trial, and not to await this Court's decisions in other cases raising reapportionment questions. On the assumption that the District Court would hold a hearing within 30 days of the entry of this Court's order, we deferred consideration of the petition for writ of mandamus until June 17, 1976.

[10] The District Court postulated two specific guidelines on county boundary integrity:

"1. If a county has more than enough population for the election of a Representative or Senator, then there shall be one complete district within that county, thus at least one Senator or Representative will be chosen solely by that county. In practical effect this will largely preserve the integrity of county boundaries and conform, to a degree, with the state policy on that subject, *Mahan* v. *Howell* [410 U. S. 315].

"2. Except where two or more districts may properly be set up *within* the same county as authorized by Mississippi Constitution, Section 254, no county will be split into more than two segments." (Emphasis in original.) *Connor* v. *Finch*, 419 F. Supp. 1072, 1076.

ants, as cross-appellants, argue by contrast that the District Court went too far, and that the Mississippi policy of respecting county lines required the court to continue the utilization of multimember districts.

This litigation is a classic example of the proposition that " 'the federal courts are often going to be faced with hard remedial problems' in minimizing friction between their remedies and legitimate state policies." *Taylor* v. *McKeithen*, 407 U. S. 191, 194, quoting *Sixty-seventh Minnesota State Senate* v. *Beens*, 406 U. S. 187, 204 (dissenting opinion). The essential question here is whether the District Court properly exercised its equitable discretion in reconciling the requirements of the Constitution with the goals of state political policy.

Although every state reapportionment plan is fraught with its own peculiar factual difficulties, it can hardly be said that this Court has given no guidance of general applicability to a court confronted with the need to devise a legislative reapportionment plan when the state legislature has failed. We have made clear that in two important respects a court will be held to stricter standards in accomplishing its task than will a state legislature: "[U]nless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts, and, as well, must ordinarily achieve the goal of population equality with little more than *de minimis* variation." *Chapman* v. *Meier*, 420 U. S., at 26–27.

These high standards reflect the unusual position of federal courts as draftsmen of reapportionment plans. We have repeatedly emphasized that "legislative reapportionment is primarily a matter for legislative consideration and determination," *Reynolds* v. *Sims*, 377 U. S., at 586,[11] for a state legislature is the institution that is by far the best situated to

[11] See also *Chapman* v. *Meier*, 420 U. S. 1, 27; *Connor* v. *Williams*, 404 U. S. 549, 552 n. 4; *Burns* v. *Richardson*, 384 U. S. 73, 85.

identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name. In the wake of a legislature's failure constitutionally to reconcile these conflicting state and federal goals, however, a federal court is left with the unwelcome obligation of performing in the legislature's stead, while lacking the political authoritativeness that the legislature can bring to the task. In such circumstances, the court's task is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner "free from any taint of arbitrariness or discrimination." *Roman* v. *Sincock,* 377 U. S. 695, 710.

A

Because the practice of multimember districting can contribute to voter confusion, make legislative representatives more remote from their constituents, and tend to submerge electoral minorities and overrepresent electoral majorities, this Court has concluded that single-member districts are to be preferred in court-ordered legislative reapportionment plans unless the court can articulate a "singular combination of unique factors" that justifies a different result. *Mahan* v. *Howell,* 410 U. S. 315, 333; *Chapman* v. *Meier, supra,* at 21; *East Carroll Parish School Board* v. *Marshall,* 424 U. S. 636, 639. In its final plan, and over the defendants' objection, the District Court in the present case accordingly abandoned—albeit reluctantly—its previous adherence to multimember districting. The defendants' unallayed reliance on Mississippi's historic policy against fragmenting counties is insufficient to overcome the strong preference for single-member districting that this Court originally announced in this very litigation. *Connor* v. *Johnson,* 402 U. S., at 692; *Connor* v. *Williams,* 404 U. S., at 551.

B

The Equal Protection Clause requires that legislative districts be of nearly equal population, so that each person's vote may be given equal weight in the election of representatives. *Reynolds* v. *Sims, supra.* It was recognition of that fundamental tenet that motivated judicial involvement in the first place in what had been called the "political thicket" of legislative apportionment. *Baker* v. *Carr,* 369 U. S. 186. The District Court's plan nevertheless departs from that norm in deference to Mississippi's historic respect for the integrity of county boundaries in conjunction with legislative districts. The result, as the District Court itself recognized, was "greater variances in population percentages in some instances than ordinarily would have been preferred." 419 F. Supp., at 1076.

Given the 1970 Mississippi population of 2,216,912 to be apportioned among 52 Senate districts,[12] the population norm for a Senate seat if absolute population equality were to be achieved would be 42,633. As computed by the District Court,[13] the Senate plan contains a maximum deviation from

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[12] Miss. Const., Art. 13, § 255.

[13] In gauging the total population deviations from the House and Senate norms, we accept the District Court's calculation of district populations and population deviations. As is not unusual in cases such as this, there is considerable controversy among the parties as to what the proper population figures are. The census is itself at best an approximate estimate of a State's population at a frozen moment in time. Because it is taken by census tract rather than along supervisory district or voting precinct lines, relevant population figures for these political districts have to be extrapolated. That process is complicated by the recognition that major shifts in population and in voting precinct lines have occurred since the 1970 census, and by the fact that proportionally more Negroes than whites are ineligible to vote because of age.

We need not "enter this imbroglio of mathematical manipulation," but instead "confine our consideration to the figures actually found by the court." *Mahan* v. *Howell,* 410 U. S. 315, 319 n. 6. See also *Burns* v. *Richardson, supra,* at 91–93. On remand, however, to avoid the sub-

population equality of 16.5%,[14] with the largest variances occurring in District 6 (8.2% above the norm) and in District 38 (8.3% below the norm). Fourteen of the court's 52 Senate districts have variances from population equality of over 5%, plus or minus, and four of those have variances of 8% or more, plus or minus. In the House plan, with 122 seats,[15] and a population norm of 18,171, there is a maximum deviation of 19.3%, with the largest variances occurring in District 5 (9.4% over the norm) and District 47 (9.9% below the norm).[16] Forty-eight districts vary more than 5% either way, and 11 of those districts vary more than 8% either way.

Such substantial deviations from population equality simply cannot be tolerated in a court-ordered plan, in the absence of some compelling justification:

> "With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features.
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> . . . . .
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> ". . . [A] court-ordered reapportionment plan of a state legislature . . . must ordinarily achieve the goal of population equality with little more than *de minimis* variation. Where important and significant state considerations rationally mandate departure from these standards, it is the reapportioning court's responsibility to articulate pre-

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stantial confusion that characterizes the record now before us, the District Court should explain the genesis of the population figures on which it relies.

[14] We note that the appellants in No. 76-935 assert that simple mathematical error resulted in understating the population variance in Senate District 29. According to their figures, that district has a variance of 9.96%, resulting in a maximum deviation in the court's Senate plan of 18.29%.

[15] Miss. Const., Art. 13, § 254.

[16] The District Court originally calculated the total variance at 18.5%, but its December 21, 1976, order, amending its previous judgment, increased the variance in District 47 from −9.1% to −9.9%.

cisely why a plan of single-member districts with minimal population variance cannot be adopted." *Chapman* v. *Meier*, 420 U. S., at 26–27 (footnote omitted).

The maximum population deviations of 16.5% in the Senate districts and 19.3% in the House districts can hardly be characterized as *de minimis;* they substantially exceed the "under-10%" deviations the Court has previously considered to be of prima facie constitutional validity only in the context of legislatively enacted apportionments.[17] See *Gaffney* v. *Cummings*, 412 U. S. 735 (7.83% maximum deviation from the population norm); *White* v. *Regester*, 412 U. S. 755 (9.9% maximum deviation from the population norm). Hence even a legislatively crafted apportionment with deviations of this magnitude could be justified only if it were "based on legitimate considerations incident to the effectuation of a rational state policy." *Reynolds* v. *Sims*, 377 U. S., at 579, quoted in *Mahan* v. *Howell*, 410 U. S., at 325.

As justification for both the Senate and House plans, the District Court pointed to a fairly consistent state policy of maintaining the borders of its 82 counties when allotting seats in the legislature, and to the fact that this policy is rationalized in part by the lack of legislative powers entrusted to the counties, whose legislative needs must instead be met by reliance on private bills introduced by members of the state legislature.[18] But the District Court itself recognized at an

[17] The Court refused to assume in *Chapman* v. *Meier* that even a 5.95% deviation from the norm would necessarily satisfy the high standards required of court-ordered plans.

[18] As justification for the high population deviations in the House plan, the District Court also "emphasize[d] that the exceedingly low 1% population norm of 181 persons has made our task . . . far more difficult"—*i. e.*, the small population of the House districts means that any underinclusion or overinclusion of 181 persons in a district results in an incremental 1% deviation from the population norm for that district. 419 F. Supp., at 1112. The 1% population norm in the sparsely populated State of North Dakota was 121, but the Court did not consider that a

earlier stage in this litigation that the policy against breaking county boundary lines is virtually impossible of accomplishment in a State where population is unevenly distributed among 82 counties, from which 52 Senators and 122 House members are to be elected. Only 11 of 82 counties have enough people to elect a Senator, and only 44 counties have enough people to elect a Representative. *Connor* v. *Johnson,* 330 F. Supp., at 509.

The policy of maintaining the inviolability of county lines in such circumstances, if strictly adhered to, must inevitably collide with the basic equal protection standard of one person, one vote. Indeed, Mississippi's insistent adherence to that policy resulted in the invalidation of three successive legislative apportionments as constitutionally impermissible. See *Connor* v. *Johnson,* 256 F. Supp. 962; *Connor* v. *Johnson,* 265 F. Supp. 492; *Connor* v. *Johnson,* 330 F. Supp. 506.

Recognition that a State may properly seek to protect the integrity of political subdivisions or historical boundary lines permits no more than "minor deviations" from the basic requirement that legislative districts must be "as nearly of equal population as is practicable." *Roman* v. *Sincock,* 377 U. S., at 710; *Reynolds* v. *Sims, supra,* at 577. The question is one of degree. In *Chapman* v. *Meier,* however, it was established that the latitude in court-ordered plans for departure from the *Reynolds* standards in order to maintain county lines is considerably narrower than that accorded apportionments devised by state legislatures, and that the burden of articulating special reasons for following such a policy in the face of substantial population inequalities is correspond-

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"legitimate basis for a departure from the goal of equality" in *Chapman* v. *Meier,* 420 U. S., at 24. Instead we recognized that "each individual vote may be more important to the result of an election" in such circumstances, and concluded that "particular emphasis should be placed on establishing districts with as exact population equality as possible." *Id.,* at 25.

ingly higher. The District Court failed here to identify any such "unique features" of the Mississippi political structure as would permit a judicial protection of county boundaries in the teeth of the judicial duty to "achieve the goal of population equality with little more than *de minimis* variation." *Chapman* v. *Meier*, *supra*, at 26–27.

Under the less stringent standards governing legislatively adopted apportionments, the goal of maintaining political subdivisions as districts sufficed to justify a 16.4% population deviation in the plan for the Virginia House of Delegates. *Mahan* v. *Howell*, 410 U. S. 315. But in *Mahan*, there was uncontradicted evidence that the legislature's plan " 'produces the minimum deviation above and below the norm, keeping intact political boundaries.' " *Id.*, at 326. By contrast, the plaintiffs in this case submitted to the District Court an alternative Senate plan that served the state policy against fragmenting county boundaries better than did the plan the court ultimately adopted, and also came closer to achieving districts that are "as nearly of equal population as is practicable." *Reynolds* v. *Sims*, *supra*, at 577. The 19 county boundaries cut by the court plan would have been reduced to 15 in the so-called "Modified Henderson Plan" submitted by the plaintiffs; the maximum population deviation in any district would have been reduced from 16.5% to 13.66%, and the number of districts deviating by more than 5% from the population norm, plus or minus, would have been reduced from 15 to 9. As in *Chapman*, "our reference to the [Henderson] plan is to show that the factors cited by the District Court cannot be viewed as controlling and persuasive when other, less statistically offensive, plans already devised are feasible." 420 U. S., at 26. See also *Kilgarlin* v. *Hill*, 386 U. S. 120, 124; *Swann* v. *Adams*, 385 U. S. 440, 445–446.

In the absence of a convincing justification for its continued adherence to a plan that even in state policy terms is less efficacious than another plan actually proposed, there can be

no alternative but to set aside the District Court's decree for its failure to embody the equitable discretion necessary to effectuate the established standards of the Equal Protection Clause.[19]

III

Since the District Court's legislative reapportionment decree is invalid under the elementary standards of *Reynolds* v. *Sims*, we do not reach the more particularized challenges to certain aspects of that reapportionment plan made by the plaintiffs—challenges based upon claims that the plan's apportionment of some districts impermissibly dilutes Negro voting strength. *Swann* v. *Adams*, *supra*, at 446–447.[20]

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[19] The appellants in No. 76–935 challenged the Senate reapportionment as a whole under *Reynolds* v. *Sims*. They did not make a blanket challenge to the entire House plan under the *Reynolds* v. *Sims* doctrine, since they viewed it as "go[ing] a long way toward alleviating the dilution of black voting strength present in the 1971 and 1975 . . . court-ordered House plans." They did, however, challenge several districts in the House plan as excessively malapportioned (arguing, for example, that the plan created a total deviation of 18.2% for four House districts in Washington and Issaquena Counties), and all of the plaintiffs supported their claims of fragmentation of Negro voting strength by pointing to significant deviations from the House population norm.

In the context of a court-ordered plan that results in the sort of systemic violation revealed by the figures in this record, it is hardly appropriate to confine our scrutiny to particularly egregious, but localized examples of violations specifically relied on by the parties. And even if the constitutional validity of the entire court-ordered House plan could not appropriately be viewed as an issue implicitly raised by the parties, this Court has the authority and the duty in exceptional circumstances to notice federal-court errors to which no exception has been taken, when they "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U. S. 157, 160, quoted in *Silber* v. *United States*, 370 U. S. 717, 718. See also *Blonder-Tongue Laboratories* v. *University Foundation*, 402 U. S. 313, 320 n. 6; *Sibbach* v. *Wilson*, 312 U. S. 1, 16; R. Stern & E. Gressman, Supreme Court Practice § 6.37 (4th ed. 1969).

[20] The plaintiffs also argue that special elections should have been

But since the 1979 elections are on the horizon and a constitutionally permissible legislative reapportionment plan for the State of Mississippi has yet to be drawn, it is appropriate to give some further guidance to the District Court with these challenges in mind.[21] Cf. *Chapman* v. *Meier*, 420 U. S., at 26.

To support their claim of impermissible racial dilution,[22] the plaintiffs point to unexplained departures from the neutral guidelines the District Court adopted to govern its formulation of a reapportionment plan—departures which have the apparent effect of scattering Negro voting concentrations among a number of white majority districts. They point in particular to the District Court's failure adequately to explain its adoption of irregularly shaped districts when alternative plans exhibiting contiguity, compactness, and lower or acceptable population variances were at hand. The plaintiffs have referred us to two types of situations in which the District Court's decree fails to meet its own goal that legislative districts be reasonably contiguous and compact: in its subdivisions of large counties whose population entitles them to elect several legislative representatives to both houses, and in its aggregations of smaller counties to put together enough people to elect one legislator.

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ordered in a number of House and Senate districts to remedy the serious deficiencies in the 1975 court-ordered plan under which the present state legislature was elected. These arguments, too, become moot in view of the invalidity of the entire reapportionment decree now before us.

[21] The plaintiffs assert that the reapportionment decree, if found to dilute Negro voting strength, is unconstitutional under the Fourteenth and Fifteenth Amendments. Our limited comments here, however, are addressed only to the question of the District Court's appropriate exercise of its discretion in remedying the Mississippi Legislature's failure to enact a valid apportionment under the equal protection standards established by *Reynolds* v. *Sims*. Cf. *Ashwander* v. *TVA*, 297 U. S. 288, 347 (Brandeis, J., concurring).

[22] See, *e. g.*, *White* v. *Regester*, 412 U. S. 755; *Whitcomb* v. *Chavis*, 403 U. S. 124; *Abate* v. *Mundt*, 403 U. S. 182, 184 n. 2; *Burns* v. *Richardson*, 384 U. S., at 88–89; *Fortson* v. *Dorsey*, 379 U. S. 433, 439.

Hinds County exemplifies the large county problem.[23] It is the site of the State's largest city, Jackson, and is the most populous Mississippi county, with a total of 214,973 residents, 84,064 of whom are Negroes. As are all Mississippi counties, Hinds is divided into five supervisory districts or "beats"; each beat elects one supervisor to sit on the Board of Supervisors, which is charged with executive and judicial local government responsibilities. The Board of Supervisors reapportioned itself in 1969, creating five oddly shaped beats that extend from the far corners of the county in long corridors that fragment the city of Jackson, where much of the Negro population is concentrated. See *Kirksey* v. *Board of Supervisors of Hinds County*, 402 F. Supp. 658 (SD Miss.), aff'd, 528 F. 2d 536 (CA5), awaiting decision after rehearing en banc. The irregular shapes of the beats were assertedly justified as necessary to achieve equalization of road mileage, bridges, and land area among the districts, so as to equalize the primary responsibilities of the supervisors—maintenance of the roads and bridges.[24] Whatever may be the validity of those justifications for a Hinds County Board of Supervisors' apportionment first adopted in 1969, they are irrelevant to the problem of apportioning state senate seats, whose holders will presumably concern themselves with something other than maintaining roads and bridges. The District Court nevertheless concluded that each Hinds County beat should elect one Senator.

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[23] The textual examples are meant to be illustrative rather than an exhaustive catalogue of possible deficiencies in the District Court's plan. Similar criticisms could possibly be made of the districting contours in a number of other counties.

[24] The validity of these justifications for apportionment of the supervisor beats is currently under attack in *Kirksey* v. *Board of Supervisors of Hinds County*, pending in the Court of Appeals for the Fifth Circuit after reargument en banc. Our discussion of the Hinds County Senate districting problem is not to be understood as pretermitting that court's consideration of the county supervisor districting issue raised in the *Kirksey* litigation.

The District Court did not explain its preference for the Hinds County Board of Supervisors' plan, although it did note generally that "we have had to take the Counties, Beats, and [voting] precincts as they actually are." There is, however, no longstanding state policy mandating separate representation of individual beats in the legislature.[25] And there is no practical barrier that requires apportioning a large county on the basis of beat lines; Mississippi's 410 beats are in turn divided into 2,094 voting precincts, each of which is sufficiently small as the basic voting unit to allow considerable flexibility in putting together legislative districts. On this record, neither custom nor practical necessity can thus be said to justify reliance for state senatorial districting purposes upon the beats adopted by the Hinds County Board of Supervisors to govern their own election.

The District Court's treatment of Jefferson and Claiborne Counties illustrates a departure from its own announced standards in aggregating small counties to form a single-member legislative district. Jefferson and Claiborne Counties are contiguous counties on the western border of Mississippi. Claiborne has a total population of 10,086, of whom 7,522 are Negroes. Jefferson has a total population of 9,295 of whom 6,996 are Negroes. The plaintiffs suggested combining these two counties with Copiah County to make a compact Senate district with a 55% Negro voting-age population. Instead, and without explanation, the District Court combined Claiborne County with Lincoln County and with Beat 3 of Copiah County to make a white majority senatorial district; Jefferson County was combined with Beats 1, 2, 4, and 5 of Adams

[25] Unlike counties with "boundaries . . . fixed by statute for generations," beats are not units of state government, and their boundaries are frequently changed by the Boards of Supervisors. According to the District Court: "Beat lines generally follow governmental land lines as laid down by section, township, and range—in other words invisible to all, and unknown to most. It is a rare individual who knows where a beat line is at any given point . . . ." *Connor* v. *Johnson*, 330 F. Supp., at 518.

County to make an irregularly shaped senatorial district with a slight Negro voting-age majority. Compared to the plaintiffs' proposals, the District Court's senatorial districts are less compact, and in addition require the fragmentation of two counties while the plaintiffs' proposal would have fragmented none.

Such unexplained departures from the results that might have been expected to flow from the District Court's own neutral guidelines can lead, as they did here, to a charge that the departures are explicable only in terms of a purpose to minimize the voting strength of a minority group. The District Court could have avoided this charge by more carefully abiding by its stated intent of adopting reasonably contiguous and compact districts, and by fully explaining any departures from that goal.

Twelve years have passed since this litigation began, but there is still no constitutionally permissible apportionment plan for the Mississippi Legislature. It is therefore imperative for the District Court, in drawing up a new plan, to make every effort not only to comply with established constitutional standards, but also to allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges.[26] In view of the serious questions raised concerning the purpose and effect of the present decree's unusually shaped legislative districts in areas with concentrations of Negro population, the District Court on remand should either draw legislative districts that are reasonably contiguous and compact, so as to put to rest suspicions that Negro voting strength is being imper-

[26] The District Court did take a substantial step forward in its final decree by eliminating multimember districts. In setting aside this decree we do not mean to obscure the significance of that advance. Although the court's order to hold special elections in two districts to make more immediately available the fruits of its decree cannot be affirmed in the face of our judgment today that vacates the entire decree, the District Court will retain the power to order such special elections on remand as the circumstances may require or permit.

missibly diluted, or explain precisely why in a particular instance that goal cannot be accomplished.

The task facing the District Court on remand must be approached not only with great care, but with a compelling awareness of the need for its expeditious accomplishment, so that the citizens of Mississippi at long last will be enabled to elect a legislature that properly represents them.

Reversed and remanded.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of these cases.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring in part and concurring in the judgment.

I join Parts I and II of the Court's opinion and concur in its judgment. I do not understand the Court to disapprove the District Court's decision to use county lines as districting boundaries wherever possible, even though this policy may cause a greater variation in district population than would otherwise be appropriate for a court-ordered plan. The final plan adopted in this case appears to produce even greater population disparities than necessary to effectuate the county boundary policy. Cf. *Mahan* v. *Howell*, 410 U. S. 315, 326 (1973). This being so, the District Court should have articulated precise reasons for not adopting a more evenly apportioned plan. *Chapman* v. *Meier*, 420 U. S. 1, 27 (1975).

The appeals by the private parties and the United States in this case, however, were not primarily concerned with equal-population apportionment. Their more serious objections involved aspects of the District Court's plan that were claimed to dilute Negro voting power.[1] The two issues are quite

[1] In fact, several of the districting alternatives proposed by these appellants as a means of improving black representation also would have involved greater population disparities than the plan adopted by the District Court. See, *e. g.*, Brief for United States 49a (Hinds County

distinct: Equal apportionment is a majoritarian principle, but racial representation is a question of minority rights. See Smith, The Failure of Reapportionment: The Effect of Reapportionment on the Election of Blacks to Legislative Bodies, 18 How. L. J. 639 (1975). I think the Court's opinion does not sufficiently focus upon the potential dissonance between the one-person, one-vote ideal and a goal of fair representation for minorities.

The Court does not decide the racial dilution issue at this time, but the observations in Part III of its opinion indicate an approach that I think is not entirely appropriate. Details of districting are interrelated, and it is not helpful to look at isolated aspects of a statewide apportionment plan in order to determine whether a racial or other improperly motivated gerrymander has taken place. Districts that disfavor a minority group in one part of the State may be counterbalanced by favorable districts elsewhere. A better approach, therefore, is to examine the overall effect of the apportionment plan on the opportunity for fair representation of minority voters.

Statistics from the 1970 census reveal that the black voting-age population of Mississippi is 31.4%. Brief for United States 44 n. 40. Under the District Court's apportionment plan, nine of the 52 Senate districts (17.3%) and 24 of the 122 House districts (19.7%) have black majorities of the voting-age population. *Id.*, at 66. These statistics indicate that the plan would be unlikely to provide black voters with representation in the legislature equivalent to their electoral strength.[2] But I do not think that the plan improperly dilutes

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Senate districts); *id.*, at 55a (Warren County House districts); Brief for Private Appellants 45–46 (Adams County House districts).

[2] The racial-dilution challenge in this case is predicated on the common but questionable assumption that voting will take place along racial lines, and thus that blacks receive effective representation only in districts where they compose a majority of the voting-age population. See Brief for Private Appellants 28–36; Brief for United States 33–59. Such an as-

black voting strength just because it fails to provide proportional representation. See *Whitcomb* v. *Chavis*, 403 U. S. 124, 149–155 (1971).

The normal system of legislative apportionment in the United States is direct territorial representation by single-member districts. Such system does not normally provide electoral minorities with proportional representation in the legislature. The extent to which electoral strength is translated into legislative representation depends on a number of factors, including (1) the size of the voting group, (2) its geographical dispersion, (3) the size of the legislative districts, and (4) the way district boundaries are drawn.[3] The first three factors are probably sufficient to explain the result in the present case without raising an inference that the district boundaries were drawn so as further to minimize or dilute overall black voting strength.

Of course, the fact that a plan seems generally to provide fair representation would not preclude a showing that a particular aspect was adopted with an impermissibly discriminatory intent. But where the only claim is based on disparate effect, then piecemeal review of an apportionment plan may well be misleading. For example, the Court's opinion suggests that the District Court may have erred in not adopting an alternative plan combining Jefferson and Claiborne Counties into a single Senate district (with Copiah County). *Ante*, at 424–425. But the District Court's plan does combine Jefferson and Claiborne Counties into a single House district (number 81), with a 70% black majority of the voting-

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sumption perhaps would be appropriate in situations where blacks continue to be excluded from the political process. See *White* v. *Regester*, 412 U. S. 755, 765–770 (1973). Separate representation by race, however, is certainly not an optimal solution and at best can provide only a temporary, expedient remedy.

[3] See generally D. Rae, The Political Consequences of Electoral Laws (1967); Tufte, The Relationship between Seats and Votes in Two-Party Systems, 67 Am. Pol. Sci. Rev. 540 (1973).

age population. Moreover, there is no reason to believe that the alternative Senate districting would have entailed less fragmentation of county boundaries in the overall plan. The alternative proposal would have required the formation of an additional Senate district starting with three noncontiguous areas—Simpson County, Lincoln County, and part of Adams County. A complete reshuffle of the Senate districts in southwestern Mississippi thus would be necessary to implement the alternative. One can only speculate on the effect of such a reshuffle with respect to either county boundary integrity or overall black voter representation.

The Court's opinion also suggests that adherence to the criteria of contiguity and compactness would assure neutral districting. *Ante*, at 425–426. These normally are desirable characteristics of a districting plan, but I doubt that such an approach will be very effective in assuring fair representation for racial or other minority groups.[4]

A better constraint on potential gerrymandering is imposed by the use of established political boundaries. It is at this point that the goals of equal apportionment and minority representation may well conflict. To the extent that the attainment of precisely equal districts requires abandonment of longstanding political boundaries, gerrymandering is that much easier.[5] Conversely, the requirement of equal apportionment

[4] It is not clear that workable standards of evaluating compactness are available, and in any event a requirement of compactness would not necessarily promote minority group representation. See R. Dixon, Democratic Representation 460–461 (1968); Mayhew, Congressional Representation: Theory and Practice in Drawing the Districts, in N. Polsby, ed., Reapportionment in the 1970s, pp. 253–255 (1971).

[5] *Reynolds* v. *Sims*, 377 U. S. 533, 578–579 (1964); *Wells* v. *Rockefeller*, 394 U. S. 542, 551–552 (1969) (Harlan, J., dissenting); *id.*, at 554–555 (WHITE, J., dissenting). See Baker, Gerrymandering: Privileged Sanctuary or Next Judicial Target?, in N. Polsby, ed., Reapportionment in the 1970s, pp. 137–138 (1971); Elliott, The Political Consequences of Reapportionment, 37 U. Chi. L. Rev. 474, 481–490 (1970).

places very little constraint on the possibility of a gerrymander, as the Court's discussion of the Hinds County Senate districts illustrates. *Ante*, at 423–424. Those districts are almost exactly equal in population, with variances from the norm ranging only from + 0.3% to + 1.3%.

None of my preceding comments are meant to suggest that intentional gerrymandering is a serious problem with court-ordered apportionment plans. But even a plan adopted with the purest of motives will have an unavoidable effect on the representation of various political groups in the legislature. Where there is an established policy of respecting political or natural boundaries in districting, then I believe that a court may best avoid any appearance of partisanship by using those boundaries as much as possible in its districting.

MR. JUSTICE POWELL dissenting.

The Court today strikes down the entire Mississippi reapportionment plan ordered by the District Court as violative of the one-person, one-vote principles announced in *Reynolds* v. *Sims*, 377 U. S. 533 (1964). In my view, this result—which no party to this protracted litigation has urged in this Court [1]—is both unnecessary and erroneous. The question, as the Court correctly states, is "whether the District Court properly exercised its equitable discretion in reconciling the requirements of the Constitution with the goals of state political policy." *Ante*, at 414. Although I believe further proceedings are necessary with respect to certain aspects of the District Court's plan, I find no basis on this record for holding that the District Court abused the broad discretion that it necessarily must exercise in cases of this kind.

In my view the District Court's overall plan is sound, and

[1] The United States, the appellant in No. 76–934, does not challenge the plan as failing to meet the one-person, one-vote requirement of the Equal Protection Clause. The private appellants challenge only the Senate plan and limited aspects of the House plan on this basis.

does not impermissibly depart from the one-person, one-vote requirements of our prior cases. The court's plan contains maximum deviations from absolute population equality of 16.5% (Senate) and 19.3% (House). In *Mahan* v. *Howell*, 410 U. S. 315 (1973), we sustained a legislative reapportionment plan for the Virginia House of Delegates in which the maximum variation was 16.4%. We held that this deviation was justified by the State's policy of maintaining the integrity of political subdivision lines, *id.*, at 325; see *Davis* v. *Mann*, 377 U. S. 678, 686 (1964). The same policy justifies the comparable deviations in the District Court's plan for Mississippi, a State which also has a tradition of respecting the integrity of political subdivision lines in drawing legislative districts.

To be sure, the plan before us was ordered by a federal court, and we have said that such a plan must be examined more critically than one adopted by a state legislature. *Chapman* v. *Meier*, 420 U. S. 1 (1975). But the theory underlying that more demanding standard of review is that legislative plans are likely to reflect a State's political policy and the will of its people more accurately than a decision by unelected federal judges. Where the deviations in a court's plan are attributable, as in this case, to an explicit policy of deference to the State's traditional district lines, the distinction becomes relatively unimportant.[2] And where the deviations are also accepted by all parties to the litigation, as is true of the basic House plan, the distinction seems wholly irrelevant.

The issue primarily presented and argued in these appeals is whether the District Court plan impermissibly dilutes Negro voting strength. I agree generally with MR. JUSTICE BLACKMUN'S concurring opinion on this aspect of the case.

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[2] We noted in *Chapman:* "It is far from apparent that North Dakota policy currently requires or favors strict adherence to political lines." 420 U. S., at 25.

I find no evidence in this record to suggest that the plan, which assures substantial Negro representation in the State, Brief for United States 22, has had the overall effect of diluting the Negro vote.

The United States and the private appellants, however, have called our attention to a number of specific concentrations of Negro voters in the State which are fragmented among two or more districts by the court's plan. The United States focuses in particular on six counties for which it claims that alternative district lines proposed by the parties would preserve an appropriate reconciliation of competing interests—population equality, geographic compactness, adherence to traditional political boundaries—without fragmenting the Negro vote.[3] Because the District Court failed to explain why it rejected the proposed alternatives, these contentions are virtually impossible to review. Accordingly, I would remand the case to the District Court for further findings comparing in detail the challenged lines in the court's plan to those proposed by the United States. But I would limit the scope of the remand to the districts specifically challenged in this appeal by the United States for unnecessary racial dilution and to the districts which would require readjustment under the alternatives the United States has proposed.[4] In all other respects I would affirm the judgment of the District Court.[5]

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[3] The counties and challenged districts are as follows: Hinds (Senate Districts 31–35); Warren (House Districts 53–55); Forrest (House Districts 103–106); Washington (House Districts 32–35), and Claiborne and Jefferson (Senate Districts 37–38). Brief for United States 74–92, 45a–71a.

[4] The alternative proposed for Warren County (House Districts 53–55) would require redistricting in House Districts 47 and 56. *Id.*, at 54a n. *. The alternative proposed in Claiborne and Jefferson Counties (Senate Districts 37 and 38) apparently would require readjustment in the surrounding counties. *Id.*, at 68a–71a.

As the Court notes, the validity of the apportionment in Hinds County is now pending in the Court of Appeals for the Fifth Circuit after rehearing en banc. *Kirksey* v. *Board of Supervisors of Hinds County*, No. 75–

[*Footnote 5 is on p. 433*]

2212. I agree that we should not pretermit that court's consideration of issues before it. If the Fifth Circuit in *Kirksey* were to order the supervisory districts to be redrawn, the District Court necessarily would have to re-examine the corresponding legislative districts in its apportionment plan.

Although the private appellants challenge additional aspects of the court's Senate plan for unnecessary racial dilution, they do not offer alternatives limited to the affected districts in the court's plan but instead urge that the entire plan be set aside. Because I believe the basic plan is sound for the reasons stated in text, I would reject these additional challenges. The private appellants also challenge the court's House plan for Adams County, claiming that the court should have adopted a district with a larger Negro voting-age population (59.5%) than that which obtains in District 89 (50.7%). In my view this contention is without merit.

[5] The Court's disposition of the case makes it unnecessary to discuss the further issue of special elections.

TRAINOR, DIRECTOR, ILLINOIS DEPARTMENT OF PUBLIC AID, ET AL. *v.* HERNANDEZ ET UX.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 75-1407. Argued January 18, 1977—Decided May 31, 1977

Rather than charging appellees with the crime of fraudulently concealing assets while applying for and receiving public assistance, the Illinois Department of Public Aid (IDPA) brought a civil action against appellees in state court seeking only a return of the welfare payments alleged to have been wrongfully received, and as part of the action a writ of attachment was issued and executed pursuant to the Illinois Attachment Act against appellees' property without notice or hearing. Instead of seeking a prompt hearing in the state court or moving there to quash the attachment on federal constitutional grounds, appellees filed suit against appellant IDPA officials in Federal District Court, alleging that the Attachment Act was unconstitutional in that it provided for deprivation of debtors' property without due process of law, and seeking, *inter alia*, return of the attached property. Declining to dismiss the complaint under the doctrine of *Younger* v. *Harris*, 401 U. S. 37, and *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, a three-judge court held the Act unconstitutional and issued an injunction directing return of appellees' attached property. *Held:* The District Court should have dismissed appellees' complaint under *Younger*, *supra*, and *Huffman*, *supra*, unless their state remedies were inadequate to litigate their federal due process claim, since the injunction asked for and issued by the court interfered with Illinois' efforts to utilize the Attachment Act as an integral part of the State's enforcement action. Pp. 440-447.

(a) The principles of *Younger* and *Huffman* are broad enough to apply to interference by a federal court with an ongoing civil enforcement action such as this, brought by the State in its sovereign capacity. Pp. 443-444.

(b) For the federal court to have proceeded with the case rather than remitting appellees to their remedies in the pending state suit confronts the State with the choice of engaging in duplicative litigation, thereby risking a temporary federal injunction, or of interrupting its enforcement proceedings pending the federal court's decision at some unknown time in the future; and forecloses the state court's opportunity

to construe the challenged statute in the face of the federal constitutional challenges that would also be pending for decision before it. P. 445.

(c) There was no basis for the District Court's proceeding to judgment on the ground that extraordinary circumstances warranted federal interference. There is no suggestion that the pending state action was brought in bad faith or to harass appellees and no basis for finding that the Attachment Act violated "express constitutional provisions in every clause, sentence and paragraph and in whatever manner and against whomever an effort might be made to apply it." Pp. 446–447.

405 F. Supp. 757, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 448. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 450. STEWART, J., filed a dissenting statement, *post*, p. 448. STEVENS, J., filed a dissenting opinion, *post*, p. 460.

Paul J. Bargiel, Assistant Attorney General of Illinois, argued the cause for appellants. With him on the briefs were *William J. Scott*, Attorney General, and *Stephen R. Swofford*, Assistant Attorney General.

John Dienner III argued the cause for appellees Finley et al. in support of appellants. With him on the briefs were *Bernard Carey* and *Paul P. Biebel, Jr.*

Fred L. Lieb argued the cause for appellees Hernandez et ux. With him on the brief were *Alan Dockterman, James O. Latturner*, and *Sheldon Roodman*.

MR. JUSTICE WHITE delivered the opinion of the Court.

The Illinois Department of Public Aid (IDPA) filed a lawsuit in the Circuit Court of Cook County, Ill., on October 30, 1974, against appellees Juan and Maria Hernandez, alleging that they had fraudulently concealed assets while applying for and receiving public assistance. Such conduct is a crime under Illinois law, Ill. Rev. Stat., c. 23, § 11–21 (1973). The IDPA, however, proceeded civilly and sought only return of the money alleged to have been wrongfully

received. The IDPA simultaneously instituted an attachment proceeding against appellees' property. Pursuant to the Illinois Attachment Act, Ill. Rev. Stat., c. 11 (1973) (Act), the IDPA filed an affidavit setting forth the nature and amount of the underlying claim and alleging that the appellees had obtained money from the IDPA by fraud.[1] The writ of attachment was issued automatically[2] by the clerk of the court upon receipt of this affidavit.[3] The writ

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[1] Under § 1 of the Act, a writ will issue only upon allegation in the affidavit of one of the following nine grounds:

"First: Where the debtor is not a resident of this State.

"Second: When the debtor conceals himself or stands in defiance of an officer, so that process cannot be served upon him.

"Third: Where the debtor has departed from this State with the intention of having his effects removed from this State.

"Fourth: Where the debtor is about to depart from this State with the intention of having his effects removed from this State.

"Fifth: Where the debtor is about to remove his property from this State to the injury of such creditor.

"Sixth: Where the debtor has within 2 years preceding the filing of the affidavit required, fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder or delay his creditors.

"Seventh: Where the debtor has, within 2 years prior to the filing of such affidavit, fraudulently concealed or disposed of his property so as to hinder or delay his creditors.

"Eighth: Where the debtor is about fraudulently to conceal, assign, or otherwise dispose of his property or effects, so as to hinder or delay his creditors.

"Ninth: Where the debt sued for was fraudulently contracted on the part of the debtor: Provided, the statements of the debtor, his agent or attorney, which constitute the fraud, shall have been reduced to writing, and his signature attached thereto, by himself, agent or attorney."

[2] Under § 2 of the Act, in cases sounding in tort the writ is not issued until a judge has examined the plaintiff under oath and determined that the damages suffered exceed the amount of the attachment.

[3] Section 2 of the Act provides in part:

"2. Affidavit—Statement—Examination under oath. § 2. To entitle a creditor to such a writ of attachment, he or his agent or attorney shall make and file with the clerk of the circuit court, an affidavit setting forth

was then given to the sheriff who executed it, on November 5, 1974, on money belonging to appellees in a credit union. Appellees received notice of the attachment, freezing their money in the credit union, on November 8, 1974, when they received the writ, the complaint, and the affidavit in support of the writ. The writ indicated a return date for the attachment proceeding of November 18, 1974.[4] Appellees appeared in court on November 18, 1974, and were informed that the matter would be continued until December 19, 1974. Appellees never filed an answer either to the attachment or to the underlying complaint.[5] They did not seek a prompt hear-

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the nature and amount of the claim, so far as practicable, after allowing all just credits and set-offs, and any one or more of the causes mentioned in section 1, and also stating the place of residence of the defendants, if known, and if not known, that upon diligent inquiry the affiant has not been able to ascertain the same together with a written statement, either embodied in such affidavit or separately in writing, executed by the attorney or attorneys representing the creditor, to the effect that the attachment action invoked by such affidavit does or does not sound in tort, also a designation of the return day for the summons to be issued in said action."

Since the State was a party, the normal requirement that the plaintiff post a bond in an amount equal to twice the amount sued for, did not apply and no bond was posted. See § 4a of the Act.

[4] Section 6 of the Act provides:

"The writ of attachment required in the preceding section shall be directed to the sheriff (and, for purpose only of service of summons, to any person authorized to serve writs of summons), or in case the sheriff is interested, or otherwise disqualified or prevented from acting, to the coroner of the county in which the suit is commenced, and shall be made returnable on a return day designated by the plaintiff, which day shall not be less than ten days or more than sixty days after its date."

[5] Section 27 of the Act provides:

"The defendant may answer, traversing the facts stated in the affidavit upon which the attachment issued, which answer shall be verified by affidavit; and if, upon the trial thereon, the issue shall be found for the plaintiff, the defendant may answer the complaint or file a motion directed thereto as in other cases, but if found for the defendant, the attachment shall be quashed, and the costs of the attachment shall be adjudged against

ing, nor did they attempt to quash the attachment on the ground that the procedures surrounding its issuance rendered it and the Act unconstitutional. Instead appellees filed the instant lawsuit in the United States District Court for the Northern District of Illinois on December 2, 1974, seeking, *inter alia*, return of the attached money. The federal complaint alleged that the appellees' property had been attached pursuant to the Act and that the Act was unconstitutional in that it provided for the deprivation of debtors' property without due process of law. Appellees as plaintiffs sought to represent a class of those "who have had or may have their property attached without notice or hearing upon the creditor's mere allegation of fraudulent conduct pursuant to the Illinois Attachment Act." App. 6–7. They named as defendants appellants Trainor and O'Malley, officials of the IDPA, and sought declaration of a defendant class made up of all the court clerks in the Circuit Courts of Illinois, and of another defendant class of all sheriffs in Illinois. They sought an injunction against Trainor and O'Malley forbidding them to seek attachments under the Act and an injunction against the clerks and sheriffs forbidding them to issue or serve writs of attachment under the Act. Appellees also sought preliminary relief in the form of an order directing the Sheriff of Cook County to release the property which had been attached. Finally, appellees sought the convening of a three-judge court pursuant to 28 U. S. C. § 2284.

The District Court declined to rule on the request for preliminary relief because the parties had agreed that one-half of the money in the credit union would be returned. A three-judge court was convened. It certified the suit as a plaintiff and defendant class action as appellees had requested. App. 63. In an opinion dated December 19, 1975, almost one year after the return date of the attachment in state court, it

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the plaintiff, but the suit shall proceed to final judgment as though commenced by summons."

declined to dismiss the case under the doctrine of *Younger* v. *Harris*, 401 U. S. 37 (1971), and *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975), stating:

> "In *Huffman*, the State of Ohio proceeded under a statute which gave an exclusive right of action to the state. By contrast, the Illinois Attachment Act provides a cause of action for any person, public or private. It is mere happenstance that the State of Illinois was the petitioner in this attachment proceeding. It is likewise coincidental that the pending state proceedings may arguably be quasi-criminal in nature; under the Illinois Attachment Act, they need not be. These major distinctions preclude this Court from extending the principles of *Younger*, based on considerations of equity, comity and federalism, beyond the quasi-criminal situation set forth in *Huffman*." *Hernandez* v. *Danaher*, 405 F. Supp. 757, 760 (1975).

Proceeding to the merits, it held §§ 1, 2, 2a, 6, 8, 10, and 14 of the Act to be "on [their face] patently violative of the due process clause of the Fourteenth Amendment to the United States Constitution." 405 F. Supp., at 762. It ordered the clerk of the court and the Sheriff of Cook County to return to appellees the rest of their attached property; it enjoined all clerks and all sheriffs from issuing or serving attachment writs pursuant to the Act and ordered them to release any currently held attached property to its owner; and it enjoined appellants Trainor and O'Malley from authorizing applications for attachment writs pursuant to the Act. App. 65–66. Appellants appealed to this Court under 28 U. S. C. § 1253, claiming that under *Younger* and *Huffman* principles the District Court should have dismissed the suit without passing on the constitutionality of the Act and that the Act is in any event constitutional.[6] Since we agree with appellants that *Younger* and

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[6] Appellees argue that the sheriffs and clerks have not perfected their appeals and that the IDPA officials cannot litigate in connection with

Huffman principles do apply here, we do not reach their second claim.

Because our federal and state legal systems have overlapping jurisdiction and responsibilities, we have frequently inquired into the proper role of a federal court, in a case pending before it and otherwise within its jurisdiction, when litigation between the same parties and raising the same issues is or apparently soon will be pending in a state court. More precisely, when a suit is filed in a federal court challenging the constitutionality of a state law under the Federal Constitution and seeking to have state officers enjoined from enforcing it, should the federal court proceed to judgment when it appears that the State has already instituted proceedings in the state court to enforce the challenged statute against the federal plaintiff and the latter could tender and have his federal claims decided in the state court?

Younger v. *Harris, supra,* and *Samuels* v. *Mackell,* 401 U. S. 66 (1971), addressed these questions where the already pending state proceeding was a criminal prosecution and the federal plaintiff sought to invalidate the statute under which the state prosecution was brought. In these circumstances, the Court ruled that the Federal District Court should issue neither a declaratory judgment nor an injunction but should dismiss the case. The first justification the Court gave for this rule was simply the "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not

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their appeals the validity of the injunction directing the clerk of the court to return appellees' property in the credit union. The argument is meritless. The IDPA officials were parties below; the order directing the clerk to return the property attached for the benefit of IDPA affects their interests in a vital way; and their ability to obtain review of such an order cannot depend on whether the clerk—over whom IDPA has no control—chooses to perfect his appeal.

suffer irreparable injury if denied equitable relief." *Younger* v. *Harris, supra,* at 43–44.

Beyond the accepted rule that equity will ordinarily not enjoin the prosecution of a crime, however, the Court voiced a "more vital consideration," 401 U. S., at 44, namely, that in a Union where both the States and the Federal Government are sovereign entities, there are basic concerns of federalism which counsel against interference by federal courts, through injunctions or otherwise, with legitimate state functions, particularly with the operation of state courts. Relying on cases that declared that courts of equity should give "scrupulous regard [to] the rightful independence of state governments," *Beal* v. *Missouri Pacific R. Co.,* 312 U. S. 45, 50 (1941), the Court held, that in this intergovernmental context, the two classic preconditions for the exercise of equity jurisdiction assumed new dimensions. Although the existence of an adequate remedy at law barring equitable relief normally would be determined by inquiring into the remedies available in the federal rather than in the state courts, *Great Lakes Co.* v. *Huffman,* 319 U. S. 293, 297 (1943), here the inquiry was to be broadened to focus on the remedies available in the pending state proceeding. " 'The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.' " *Younger* v. *Harris, supra,* at 45, quoting *Fenner* v. *Boykin,* 271 U. S. 240, 243–244 (1926). Dismissal of the federal suit "naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Gibson* v. *Berryhill,* 411 U. S. 564, 577 (1973). "The policy of equitable restraint . . . is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." *Kugler* v. *Helfant,* 421 U. S. 117, 124 (1975).

The Court also concluded that the other precondition for equitable relief—irreparable injury—would not be satisfied unless the threatened injury was both great and immediate. The burden of conducting a defense in the criminal prosecution was not sufficient to warrant interference by the federal courts with legitimate state efforts to enforce state laws; only extraordinary circumstances would suffice.[7] As the

[7] See *Kugler* v. *Helfant*, 421 U. S. 117, 124–125 (1975):

"Although the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution alone do not constitute 'irreparable injury' in the 'special legal sense of that term,' [*Younger* v. *Harris*, 401 U. S.,] at 46, the Court in *Younger* left room for federal equitable intervention in a state criminal trial where there is a showing of 'bad faith' or 'harassment' by state officials responsible for the prosecution, *id.*, at 54, where the state law to be applied in the criminal proceeding is '"flagrantly and patently violative of express constitutional prohibitions,"' *id.*, at 53, or where there exist other 'extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment.' *Ibid.* In the companion case of *Perez* v. *Ledesma*, 401 U. S. 82, the Court explained that '[o]nly in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate.' *Id.*, at 85. See *Mitchum* v. *Foster*, 407 U. S. 225, 230–231.

"The policy of equitable restraint expressed in *Younger* v. *Harris*, in short, is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights. See *Steffel* v. *Thompson*, 415 U. S. 452, 460. Only if 'extraordinary circumstances' render the state court incapable of fairly and fully adjudicating the federal issues before it, can there be any relaxation of the deference to be accorded to the state criminal process. The very nature of 'extraordinary circumstances,' of course, makes it impossible to anticipate and define every situation that might create a sufficient threat of such great, immediate, and irreparable injury as to warrant intervention in state criminal proceedings. [Footnote omitted.] But whatever else is required, such circumstances must be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation."

Court later explained, to restrain a state proceeding that afforded an adequate vehicle for vindicating the federal plaintiff's constitutional rights "would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility equally with the federal courts" to safeguard constitutional rights and would "reflec[t] negatively upon the state court's ability" to do so. *Steffel* v. *Thompson*, 415 U. S. 452, 460–461, 462 (1974). The State would be prevented not only from "effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies." *Huffman* v. *Pursue, Ltd.*, 420 U. S., at 604.

Huffman involved the propriety of a federal injunction against the execution of a judgment entered in a pending state-court suit brought by the State to enforce a nuisance statute. Although the state suit was a civil rather than a criminal proceeding, *Younger* principles were held to require dismissal of the federal suit. Noting that the State was a party to the nuisance proceeding and that the nuisance statute was "in aid of and closely related to criminal statutes," the Court concluded that a federal injunction would be "an offense to the State's interest in the nuisance litigation [which] is likely to be every bit as great as it would be were this a criminal proceeding." 420 U. S., at 604. Thus, while the traditional maxim that equity will not enjoin a criminal prosecution strictly speaking did not apply to the nuisance proceeding in *Huffman*, the " 'more vital consideration' " of comity, *id.*, at 601, quoting *Younger* v. *Harris*, 401 U. S., at 44, counseled restraint as strongly in the context of the pending state civil enforcement action as in the context of a pending criminal proceeding. In these circumstances, it was proper that the federal court stay its hand.

We have recently applied the analysis of *Huffman* to proceedings similar to state civil enforcement actions—judicial

contempt proceedings. *Juidice* v. *Vail*, 430 U. S. 327 (1977). The Court again stressed the "more vital consideration" of comity underlying the *Younger* doctrine and held that the state interest in vindicating the regular operation of its judicial system through the contempt process—whether that process was labeled civil, criminal, or quasi-criminal—was sufficiently important to preclude federal injunctive relief unless *Younger* standards were met.

These cases control here. An action against appellees was pending in state court when they filed their federal suit. The state action was a suit by the State to recover from appellees welfare payments that allegedly had been fraudulently obtained. The writ of attachment issued as part of that action. The District Court thought that *Younger* policies were irrelevant because suits to recover money and writs of attachment were available to private parties as well as the State; it was only because of the coincidence that the State was a party that the suit was "arguably" in aid of the criminal law. But the fact remains that the State was a party to the suit in its role of administering its public-assistance programs. Both the suit and the accompanying writ of attachment were brought to vindicate important state policies such as safeguarding the fiscal integrity of those programs. The state authorities also had the option of vindicating these policies through criminal prosecutions. See *supra*, at 435. Although, as in *Juidice*, the State's interest here is "[p]erhaps . . . not quite as important as is the State's interest in the enforcement of its criminal laws . . . or even its interest in the maintenance of a quasi-criminal proceeding . . . ," 430 U. S., at 335, the principles of *Younger* and *Huffman* are broad enough to apply to interference by a federal court with an ongoing civil enforcement action such as this, brought by the State in its sovereign capacity.[8]

[8] Title 28 U. S. C. § 2283 provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as

For a federal court to proceed with its case rather than to remit appellees to their remedies in a pending state enforcement suit would confront the State with a choice of engaging in duplicative litigation, thereby risking a temporary federal injunction, or of interrupting its enforcement proceedings pending decision of the federal court at some unknown time in the future. It would also foreclose the opportunity of the state court to construe the challenged statute in the face of the actual federal constitutional challenges that would also be pending for decision before it, a privilege not wholly shared by the federal courts. Of course, in the case before us the

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expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The section is not applicable here because this 42 U. S. C. § 1983 action is an express statutory exception to its application, *Mitchum* v. *Foster*, 407 U. S. 225 (1972); but it is significant for present purposes that the section does not discriminate between civil and criminal proceedings pending in state courts. Furthermore, 28 U. S. C. § 1341 provides that district courts shall not enjoin, suspend, or restrain the levy or collection of any tax under state law where there are adequate remedies available in state tribunals.

Prior cases in this Court that at the time counseled restraint in actions seeking to enjoin state officials from enforcing state statutes or implementing public policies, did not necessarily distinguish between the type of proceedings—civil or criminal—pending or contemplated by state officers. *Wilson* v. *Schnettler*, 365 U. S. 381, 384–385 (1961); *Allegheny County* v. *Mashuda Co.*, 360 U. S. 185, 189–190 (1959); *Alabama Public Service Comm'n* v. *Southern R. Co.*, 341 U. S. 341, 349–350 (1951); *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 317–318 (1943); *Great Lakes Co.* v. *Huffman*, 319 U. S. 293, 297–298 (1943); *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491, 494–495 (1942); *Watson* v. *Buck*, 313 U. S. 387, 400–401 (1941); *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, 49–50 (1941); *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89, 95–97 (1935); *Pennsylvania* v. *Williams*, 294 U. S. 176, 185 (1935); *Hawks* v. *Hamill*, 288 U. S. 52, 60–61 (1933); *Matthews* v. *Rodgers*, 284 U. S. 521, 525–526 (1932); *Massachusetts State Grange* v. *Benton*, 272 U. S. 525, 527 (1926); *Fenner* v. *Boykin*, 271 U. S. 240, 243 (1926).

As in *Juidice* v. *Vail*, 430 U. S. 327, 336 n. 13 (1977), we have no occasion to decide whether *Younger* principles apply to all civil litigation.

state statute was invalidated and a federal injunction prohibited state officers from using or enforcing the attachment statute for any purpose. The eviscerating impact on many state enforcement actions is readily apparent.[9] This disruption of suits by the State in its sovereign capacity, when combined with the negative reflection on the State's ability to adjudicate federal claims that occurs whenever a federal court enjoins a pending state proceeding, leads us to the conclusion that the interests of comity and federalism on which *Younger* and *Samuels* v. *Mackell* primarily rest apply in full force here. The pendency of the state-court action called for restraint by the federal court and for the dismissal of appellees' complaint unless extraordinary circumstances were present warranting federal interference or unless their state remedies were inadequate to litigate their federal due process claim.

No extraordinary circumstances warranting equitable relief were present here. There is no suggestion that the pending state action was brought in bad faith or for the purpose of harassing appellees. It is urged that this case comes within the exception that we said in *Younger* might exist where a

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[9] Appellees argue that the injunction issued below in no way interfered with a pending state case. They point to the fact that only the attachment proceeding was interfered with—the underlying fraud action may continue unimpeded—and claim that the attachment proceeding is not a court proceeding within the doctrine of *Younger* and *Huffman*. In this regard they rely on *Lynch* v. *Household Finance Corp.*, 405 U. S. 538 (1972); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); and *Gerstein* v. *Pugh*, 420 U. S. 103 (1975). None of these cases control here.

In this case the attachment was issued by a court clerk and is very much a part of the underlying action for fraud. Moreover, the attachment in this case contained a return date on which the parties were to appear in *court* and at which time the appellees would have had an opportunity to contest the validity of the attachment. Thus the attachment proceeding was "pending" *in the state courts* within the *Younger* and *Huffman* doctrine at the time of the federal suit.

state statute is " 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' " 401 U. S., at 53–54, quoting *Watson* v. *Buck*, 313 U. S. 387, 402 (1941). Even if such a finding was made below, which we doubt (see *supra*, at 439), it would not have been warranted in light of our cases. Compare *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975), with *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600 (1974).

As for whether appellees could have presented their federal due process challenge to the attachment statute in the pending state proceeding, that question, if presented below, was not addressed by the District Court, which placed its rejection of *Younger* and *Huffman* on broader grounds. The issue is heavily laden with local law, and we do not rule on it here in the first instance.[10]

The grounds on which the District Court refused to apply the principles of *Younger* and *Huffman* were infirm; it was therefore error, on those grounds, to entertain the action on behalf of either the named or the unnamed plaintiffs and to reach the issue of the constitutionality of the Illinois attachment statute.[11]

The judgment is therefore reversed, and the case is remanded

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[10] The parties are in disagreement on this issue, the State squarely asserting, and the appellees denying, that the federal due process claim could have been presented and decided in the pending attachment proceeding. MR. JUSTICE STEVENS, in dissent, offers additional reasons—not relied on by appellees and not addressed by the State—for concluding that the state suit did not offer an adequate forum for litigating the federal claim. We do not resolve these conflicting views.

[11] Appellees have argued here that the relief granted in favor of other class members is not barred by *Younger* and *Huffman* because state cases were not pending against some of them. Since the class should never have been certified, we need not address this argument.

to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART substantially agrees with the views expressed in the dissenting opinions of MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS. Accordingly, he respectfully dissents from the opinion and judgment of the Court.

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion and write only to stress that the substantiality of the State's interest in its proceeding has been an important factor in abstention cases under *Younger* v. *Harris*, 401 U. S. 37 (1971), from the beginning. In discussing comity, the Court in *Younger* clearly indicated that both federal and state interests had to be taken into account:

> "The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.*, at 44.

Consistently with this requirement of balancing the federal and state interests, the Court in previous *Younger* cases has imposed a requirement that the State must show that it has an important interest to vindicate in its own courts before the federal court must refrain from exercising otherwise proper federal jurisdiction. In *Younger* itself, the Court relied on the State's vital concern in the administration of its criminal laws. In *Huffman* v. *Pursue, Inc.*, 420 U. S. 592 (1975), the

Court stressed the fact that it dealt with a quasi-criminal state proceeding to which the State was a party. The proceeding was both in aid of and closely related to criminal statutes. Thus, the State's underlying policy interest in the litigation was deemed to be as great as the interest found in *Younger*. Similarly, in *Juidice* v. *Vail*, 430 U. S. 327 (1977), the Court found that the State's interest in its contempt procedures was substantial.

In cases where the State's interest has been more attenuated, the Court has refused to order *Younger* abstention. Thus, in *Steffel* v. *Thompson*, 415 U. S. 452 (1974), in which a state prosecution was merely threatened, the federal court was free to reach the merits of the claim for a declaratory judgment. *Id.*, at 462. In such a case, "the opportunity for adjudication of constitutional rights in a federal forum, as authorized by the Declaratory Judgment Act, becomes paramount." *Ellis* v. *Dyson*, 421 U. S. 426, 432 (1975). See generally Kanowitz, Deciding Federal Law Issues in Civil Proceedings: State Versus Federal Trial Courts, 3 Hastings Const. L. Q. 141 (1976).

Application of these principles to the instant case leads me to agree with the Court's order reversing and remanding the case. Like the Court, I am satisfied that a state proceeding was pending. *Ante*, at 444, 446 n. 9. I, too, find significant the fact that the State was a party in its sovereign capacity to both the state suit and the federal suit. *Ante*, at 444. Here, I emphasize the importance of the fact that the state interest in the pending state proceeding was substantial. In my view, the fact that the State had the option of proceeding either civilly or criminally to impose sanctions for a fraudulent concealment of assets while one applies for and receives public assistance demonstrates that the underlying state interest is of the same order of importance as the interests in *Younger* and *Huffman*. The propriety of abstention should not depend on the State's choice to vindicate its interests by a less drastic, and perhaps more lenient,

route. In addition, as the Court notes, the state-court proceeding played an important role in safeguarding the fiscal integrity of the public assistance programs. Since the benefits of the recovery of fraudulently obtained funds are enjoyed by all the taxpayers of the State, it is reasonable to recognize a distinction between the State's status as creditor and the status of private parties using the same procedures.

For me, the existence of the foregoing factors brings this case squarely within the Court's prior *Younger* abstention rulings.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

The Court continues on, to me, the wholly improper course of extending *Younger* principles to deny a federal forum to plaintiffs invoking 42 U. S. C. § 1983 for the decision of meritorious federal constitutional claims when a *civil* action that might entertain such claims is pending in a state court. Because I am of the view that the decision patently disregards Congress' purpose in enacting § 1983—to open federal courts to the decision of such claims without regard to the pendency of such state civil actions—and because the decision indefensibly departs from prior decisions of this Court, I respectfully dissent.

I

An attachment proceeding against appellees' credit union savings was instituted by the Illinois Department of Public Aid (IDPA) under the Illinois Attachment Act simultaneously with the filing of a civil lawsuit in state court for the recovery of public welfare funds allegedly fraudulently obtained. The attachment was initiated when IDPA filled in the blanks on a standard-form "Affidavit for Attachment" stating:

> "The defendants *Juan and Maria Hernandez* within two years preceding the filing of this affidavit fraudu-

lently concealed or disposed of property so as to hinder or delay *their* creditors." (Italics indicate matter inserted in blanks by IDPA.) App. 18.

The wording of the affidavit repeats almost verbatim the language of the Illinois Act,[1] and provides no underlying factual allegations upon which a determination can be made whether the conclusion of fraudulent concealment or disposition of property is justified.[2] The writ of attachment was issued as a matter of course by the clerk of the court upon receipt of the affidavit, and the writ was executed on November 5, 1974.

Appellees appeared in state court on the return date, November 18, 1974, and were informed that the hearing on

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[1] Illinois Rev. Stat., c. 11, § 1 (1973), provides:

"In any court of competent jurisdiction, a creditor having a money claim . . . may have an attachment against the property of his debtor . . . either at the time of instituting suit or thereafter . . . in any one of the following cases:

. . . . . .

"Seventh: Where the debtor has, within 2 years prior to the filing of such affidavit, fraudulently concealed or disposed of his property so as to hinder or delay his creditors."

[2] In fact, it appears that appellees *had not* "concealed or disposed of property so as to hinder or delay their creditors" even if the allegations of the unsworn attachment complaint are taken as true. The complaint only alleges that they fraudulently concealed personal property in order to obtain public assistance, not that this concealment was undertaken to avoid payment to creditors. If any part of the form affidavit is applicable to appellees, it appears to be § 1 (i), which tracks Ill. Rev. Stat., c. 11, § 1 (Ninth) (1973):

"The debt sued for was fraudulently contracted on the part of the defendant ———— and statements of ———— agent ———— or attorney, which constitute the fraud, have been reduced to writing and ———— signature ———— attached thereto, by ———— sel[f] ———— agent ———— or attorney ————." App. 18.

However, IDPA did not fill in the blanks of this portion of the form, and did not rely on it in seeking the writ of attachment.

the validity of the attachment was continued until December 19, 1974. In the meantime appellees—deprived of the use of their savings—faced pending rent and car repair bills, and past due electricity, gas, and telephone bills. On December 2, appellees filed a complaint under 42 U. S. C. § 1983 in Federal District Court seeking a declaratory judgment and an injunction against enforcement of the Illinois Attachment Act. On December 5, two weeks before the continued state-court hearing, appellees sought a temporary restraining order to release their credit union savings from the custody of the sheriff. The District Court effected an agreement between the parties whereby IDPA agreed to the release of one-half of the attached funds, and accordingly did not act on the motion for the temporary restraining order.[3]

A three-judge District Court was convened. The District Court found that it was not required to abstain from deciding the constitutional merits of appellees' challenge, and enjoined the enforcement of the Act on the ground that the Act was "patently and flagrantly violative of the constitution." *Hernandez* v. *Danaher*, 405 F. Supp. 757, 760 (ND Ill. 1975). This Court reverses and holds that the District Court should have dismissed the suit, thus continuing the course initiated in *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975), and furthered this Term in *Juidice* v. *Vail*, 430 U. S. 327 (1977), of extending *Younger* principles to pending civil actions.

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[3] The precise date of the agreement to release half of the attached funds does not appear in the record.

The Court points out that the District Court did not issue its opinion in this case until about one year after the date on which appellees could have had their continued hearing in state court to challenge the validity of the attachment. *Ante*, at 438–439. This is irrelevant since the motion for a temporary restraining order, filed two weeks before the continued hearing in state court, resulted in the agreement to release half of appellees' savings. Thus, as a practical matter, appellees received important relief in the Federal District Court at a time when any relief in state court was highly speculative.

II

I have already set out at some length the reasons for my disagreement with the Court's extension of *Younger* abstention principles to civil cases, particularly actions under 42 U. S. C. § 1983, *Huffman* v. *Pursue, Ltd., supra,* at 613 (dissenting opinion), *Juidice* v. *Vail, supra,* at 341 (dissenting opinion), and will not repeat them here. The Court suggests that this case, like *Huffman,* involves a statute enacted in aid of the criminal law. In *Huffman,* the State of Ohio brought a statutory nuisance suit in state court to close a theater that had previously been adjudged to have shown obscene films. *Huffman* stated, in words quoted by the Court today, that the nuisance proceeding "was 'in aid of and closely related to criminal statutes.'" *Ante,* at 443. The Court states the precise question in this case to be:

> "[S]hould the federal court proceed to judgment when it appears that the State has already instituted proceedings in the state court to enforce the challenged statute against the federal plaintiff and the latter could tender and have his federal claims decided in the state court?" *Ante,* at 440.

Emphasizing that the State sued in state court to "vindicate important state policies," the Court concludes that "the principles of *Younger* and *Huffman* are broad enough to apply to interference by a federal court with an ongoing civil enforcement action such as this, brought by the State in its sovereign capacity." *Ante,* at 444.

In framing the question and its answer this narrowly, the Court apparently desires once more to leave "for another day" the question of the applicability of *Younger* abstention principles to civil suits generally. *Ante,* at 445 n. 8; *Juidice, supra,* at 345 n. (BRENNAN, J., dissenting); see *Huffman, supra,* at 607. But the Court's insistence that "the interests of comity and federalism on which *Younger* and *Samuels* v. *Mackell*

primarily rest apply in full force here," *ante*, at 446, is the signal that "merely the formal announcement is being postponed," *Juidice*, *supra*, at 345 n. (BRENNAN, J., dissenting). *Younger* and *Samuels* v. *Mackell*, 401 U. S. 66 (1971), dismissed federal-court suits because the plaintiffs sought injunctions against pending criminal prosecutions. I agreed with those results because "[p]ending state criminal proceedings have always been viewed as paradigm cases involving paramount state interests." *Juidice*, *supra*, at 345 (BRENNAN, J., dissenting). But abstention principles developed to avoid interfering with state criminal prosecutions are manifestly inapplicable here.

In this case the federal plaintiffs seek an injunction only against the use of statutory attachment proceedings which, properly speaking, are not part of the pending civil suit at all. The relief granted here in no way interfered with or prevented the State from proceeding with its suit in state court. It merely enjoined the use of an unconstitutional mechanism for attaching assets from which the State hoped to satisfy its judgment if it prevailed on the merits of the underlying lawsuit. To say that the interest of the State in continuing to use an unconstitutional attachment mechanism to insure payment of a liability not yet established brings into play "in full force" "all the interests of comity and federalism" present in a state criminal prosecution is simply wrong. *Fuentes* v. *Shevin*, 407 U. S. 67 (1972), a § 1983 suit challenging a prejudgment replevin statute, addressed precisely this point. Since the plaintiffs had not sought "an injunction against any pending or future court proceeding as such . . . [but rather] challenged only the summary extrajudicial process of prejudgment seizure of property," *Fuentes* concluded that *Younger* principles posed no bar to a federal court's granting the relief sought. 407 U. S., at 71 n. 3. See also *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 554–555 (1972), and *Gerstein* v. *Pugh*, 420 U. S. 103 (1975).

The application of *Younger* principles here is also inappropriate because even in the underlying lawsuit the State seeks only a civil recovery of money allegedly fraudulently received. The Court relies on the State's fortuitous presence as a plaintiff in the state-court suit to conclude that the suit is closely related to a criminal suit, but I am hard pressed to understand why the "mere happenstance," 405 F. Supp., at 760, that the State of Illinois rather than a private party invoked the Attachment Act makes this so. The Court's reliance on the presence of the State here may suggest that it might view differently an attachment under the same Act at the instance of a private party, but no reason is advanced why the State as plaintiff should enjoy such an advantage in its own courts over the ordinary citizen plaintiff.[4] Under any analysis, it seems to me that this solicitousness for the State's use of an unconstitutional ancillary proceeding to a civil lawsuit is hardly compelled by the great principles of federalism, comity, and mutual respect between federal and state courts that account for *Younger* and its progeny.

The principles that give strength to *Younger* simply do not support an inflexible rule against federal courts' enjoining state civil proceedings. *Younger* was justified primarily on the basis of the longstanding rule that "courts of equity . . . particularly should not act to restrain a criminal prosecution." 401 U. S., at 43. A comparably rigid rule against enjoining civil proceedings was never suggested until *Huffman,* for in

[4] Even if the presence of the State as a plaintiff in the state-court proceeding is held to be of some significance, I fail to see why the federal courts should accord greater deference to the State's fiscal interest here than to the far more basic function of collecting state taxes. As my Brother STEVENS conclusively demonstrates, *post,* at 464–466, the standard applied by the Court today goes well beyond the statutory standard for a federal court's enjoining the collection of taxes, which is predicated only upon a finding of no "plain, speedy and efficient remedy" under state law. 28 U. S. C. § 1341.

civil proceedings it cannot be assumed that state interests of compelling importance outweigh the interests of litigants seeking vindication of federal rights in federal court, particularly under a statute expressly enacted by Congress to provide a federal forum for that purpose. Even assuming that federal abstention might conceivably be appropriate in some civil cases, the transformation of what I must think can only be an exception into an absolute rule crosses the line between abstention and abdication.

When it enacted § 1983, Congress weighed the competing demands of "Our Federalism," and consciously decided to protect federal rights in the federal forum. As we have previously recognized, § 1983 was enacted for the express purpose of altering the federal-state judicial balance that had theretofore existed, and of "offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and the laws of the Nation." *Mitchum* v. *Foster*, 407 U. S. 225, 239 (1972). State courts are, of course, bound to follow the Federal Constitution equally with federal courts, but Congress has clearly ordained, as constitutionally it may, that the federal courts are to be the "*primary* and powerful reliances" for vindicating federal rights under § 1983. *Steffel* v. *Thompson*, 415 U. S. 452, 464 (1974) (emphasis in original). If federal courts are to be flatly prohibited, regardless of the circumstances of the individual claim of violation of federal rights, from implementing this "uniquely federal remedy" because of deference to purported state interests in the maintenance of state civil suits, the Court has "effectively cripple[d] the congressional scheme enacted in § 1983." *Juidice* v. *Vail*, 430 U. S., at 343 (BRENNAN, J., dissenting).

III

Even assuming, *arguendo*, the applicability of *Younger* principles, I agree with the District Court that the Illinois

Attachment Act falls within one of the established exceptions to those principles. As an example of an "extraordinary circumstance" that might justify federal-court intervention, *Younger* referred to a statute that " 'might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' " 401 U. S., at 53–54, quoting *Watson* v. *Buck*, 313 U. S. 387, 402 (1941). Explicitly relying on this exception to *Younger*, the District Court held that the Illinois Act is "patently and flagrantly violative of the constitution." 405 F. Supp., at 760. The Court holds that this finding is insufficient to bring this case within the *Younger* exception because that exception "might exist where a state statute is 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' 401 U. S., at 53–54, quoting *Watson* v. *Buck*, 313 U. S. 387, 402 (1941). Even if such a finding was made below, which we doubt . . . , it would not have been warranted in light of our cases." *Ante*, at 446–447. I disagree.

Obviously, a requirement that the *Watson* v. *Buck* formulation must be literally satisfied renders the exception meaningless, and, as my Brother STEVENS demonstrates, *post*, at 461–464, elevates to a literalistic definitional status what was obviously meant only to be illustrative and nonexhaustive. The human mind does not possess a clairvoyance that can foresee whether "every clause, sentence and paragraph" of a statute will be unconstitutional "in whatever manner and against whomever an effort might be made to apply it." The only sensible construction of the test is to treat the "every clause, etc.," wording as redundant, at least when decisions of this Court make clear that the challenged statute is "patently and flagrantly violative of the Constitution." I thought that

the Court had decided as much in *Kugler* v. *Helfant*, 421 U. S. 117, 124 (1975), in stating that "*Younger* left room for federal equitable intervention in a state criminal trial . . . *where the state law to be applied in the criminal proceeding is 'flagrantly and patently violative of express constitutional prohibitions.'*" (Emphasis supplied.) [5]

Clearly the Illinois Attachment Act is "patently and flagrantly violative of express constitutional prohibitions" under the relevant decisions of this Court. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975), struck down a Georgia garnishment statute that permitted the issuance of a writ of garnishment by the court clerk upon the filing of an affidavit containing only conclusory allegations, and under which there was "no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment." *Id.*, at 607. The Illinois Attachment Act is constitutionally indistinguishable from the Georgia statute struck down in *North Georgia Finishing*. As in that case, the affidavit filed here contained only conclusory allegations, which in this case were taken from a preprinted form requiring only that the affiant fill in the names of the persons whose property he wished to attach. Upon the filing of this form affidavit, the court clerk issued the writ of attachment as a matter of course. Far from requiring an "early hearing" at which to challenge the validity of the attachment, the Illinois Act provided that the party seeking the attachment could unilaterally set the return date of the writ at any time from 10 to 60 days from the date of its execution.

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[5] The quotation, in 421 U. S., at 125 n. 4, of the complete *Buck* sentence was carefully identified in *Kugler* as merely "one example of the type of circumstances that could justify federal intervention. . . ." Curiously, the Court, *ante*, at 442 n. 7, quotes *Kugler*'s abridged formulation, but makes no attempt to explain this reference when it finally applies the "every clause, sentence and paragraph" test as the basis for its decision. *Ante*, at 446–447.

Ill. Rev. Stat., c. 11, § 6 (1973). And, as this case demonstrates, the 60-day interval does not necessarily represent the outer limit for the actual hearing date, for the Illinois court here was willing to grant a 30-day continuance beyond the date provided in the writ of attachment, even though appellees appeared in court on the proper date and wished to go forward with the hearing at that time.

No one could seriously contend that the Illinois Act even remotely resembles that sustained in *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600 (1974), and thus falls within the exception to *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969), *Fuentes* v. *Shevin*, 407 U. S. 67 (1972), and *North Georgia Finishing, supra*, carved out by that case. *W. T. Grant* upheld a Louisiana sequestration statute under which a writ of sequestration was issued only after the filing of an affidavit in which " 'the grounds relied upon for the issuance of the writ clearly appear[ed] from specific facts,' " 416 U. S., at 605. The showing of grounds for the issuance of the writ was made before a judge rather than a court clerk, *id.*, at 606, and the debtor was entitled "immediately [to] have a full hearing on the matter of possession following the execution of the writ," *id.*, at 610. None of those procedural safeguards is provided by the Illinois Act. The three-judge District Court unanimously and correctly concluded that the Act "is on its face patently violative of the due process clause of the Fourteenth Amendment." 405 F. Supp., at 762.

The Court gives only bare citations to *North Georgia Finishing* and *W. T. Grant, ante*, at 447, and declines to discuss or analyze them in even the most cursory manner. These decisions so clearly support the District Court's holding under any sensible construction of the *Younger* exception that the Court's silence, and its insistence upon compliance with the literal wording of *Watson* v. *Buck*, only confirms my conviction that the Court is determined to extend to "state *civil* proceedings generally the holding of *Younger*," *Huffman* v.

Pursue, Ltd., 420 U. S., at 613, and to give its exceptions the narrowest possible reach. I respectfully dissent.

MR. JUSTICE STEVENS, dissenting.

Today the Court adds four new complexities to a doctrine that has bewildered other federal courts for several years.[1] First, the Court finds a meaningful difference between a state procedure which is "patently and flagrantly violative of the Constitution" and one that is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."[2] Second, the Court holds that an unconstitutional collection procedure may be used by a state agency, though not by others, because there is "a distinction between the State's status as creditor and the status of private parties using the same procedures."[3] Third, the Court's application of the abstention doctrine in this case provides even greater protection to a State when it is proceeding as an ordinary creditor than the statutory protection mandated by Congress for the State in its capacity as a tax collector. Fourth, without disagreeing with the District Court's conclusion that the Illinois attachment procedure is unconstitutional, the Court remands in order to enable the District Court to decide whether that invalid procedure provides an adequate remedy for the vindication of appellees' federal rights. A comment on each of these complexities may shed light on the character of the abstention doctrine as now viewed by the Court.

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[1] See, for example, Judge Pell's search for a synthesizing principle in his article, Abstention—A Primrose Path by Any Other Name, 21 DePaul L. Rev. 926 (1972).

[2] The Court, *ante*, at 447, quotes this excerpt from *Watson* v. *Buck*, 313 U. S. 387, 402, which in turn was quoted in *Younger* v. *Harris*, 401 U. S. 37, 53–54.

[3] See MR. JUSTICE BLACKMUN's concurring opinion, *ante*, at 450.

I

The District Court found the Illinois attachment procedure "patently and flagrantly violative of the constitution." *Hernandez* v. *Danaher*, 405 F. Supp. 757, 760 (ND Ill. 1975). This Court, on the other hand, writes:

> "It is urged that this case comes within the exception that we said in *Younger* might exist where a state statute is 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' 401 U. S., at 53–54, quoting *Watson* v. *Buck*, 313 U. S. 387, 402 (1941). Even if such a finding was made below, *which we doubt* . . . , it would not have been warranted in light of our cases." *Ante*, at 446–447 (emphasis added).[4]

Since there is no doubt whatsoever as to what the District Court actually said, this Court's expression of doubt can only refer to its uncertainty as to whether a finding that the crux of the statute is patently and flagrantly unconstitutional is sufficient to satisfy the requirement that the statute be patently and flagrantly unconstitutional "in every clause, sentence and paragraph . . . ." It is, therefore, appropriate to consider what is left of this exception to the *Younger* doctrine after today's decision.

The source of this exception is the passage Mr. Justice Black had written some years earlier in *Watson* v. *Buck*, 313 U. S. 387, 402, a case which involved a complicated state antitrust Act. On the basis of its conclusion that certain sections were unconstitutional, a three-judge District Court had en-

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[4] The cavalier statement that a finding of obvious unconstitutionality would not have been warranted by prior cases simply ignores the careful analysis of the serious defects in the Illinois statute identified in the opinion of the District Court, 405 F. Supp., at 760–762, and in MR. JUSTICE BRENNAN's dissenting opinion.

joined enforcement of the entire Act.[5] This Court reversed, holding: first, that the invalidity of a part of a statute would not justify an injunction against the entire Act; and second, that in any event the eight sections in question were valid.

In his explanation of the first branch of the Court's holding, Mr. Justice Black pointed out that there are few, if any, statutes that are totally unconstitutional in every part.[6] Since *Watson* involved a new statute which had not been construed by any state court, and since such construction might have affected its constitutionality, Mr. Justice Black's comment emphasized the point that an untried state statute should not be invalidated by a federal court before the state court has an opportunity to construe it. This consideration is not present in a case involving an attack on a state statute that has been in use for more than a century. Nothing in *Watson* implies that a limited injunction against an invalid portion of a statute of long standing would be improper.

When he wrote the Court's opinion in *Younger* v. *Harris*, 401 U. S. 37, Mr. Justice Black quoted the foregoing excerpt from the *Watson* case as an example of a situation in which it would be appropriate for a federal court to enjoin a pending

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[5] The Florida legislation involved in *Watson* v. *Buck* regulated the business of persons holding music copyrights and declared certain combinations of such persons illegal as in restraint of trade. A three-judge District Court held that 8 sections of that statute conflicted with the federal copyright laws and, without considering the validity of the remaining 13 sections, enjoined enforcement of all 21 sections.

[6] "Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case. It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." 313 U. S., at 402.

state criminal prosecution.[7] He did not, however, imply that his earlier language rigidly defined the boundaries of one kind of exception from the equitable rationale underlying the *Younger* decision itself.

Today the Court seems to be saying that the "patently and flagrantly unconstitutional" exception to *Younger*-type abstention is unavailable whenever a statute has a legitimate title, or a legitimate severability clause, or some other equally innocuous provision. If this is a fair reading of the Court's opinion, the Court has given Mr. Justice Black's illustrative language definitional significance. In effect, this treatment preserves an illusion of flexibility in the application of a *Younger*-type abstention, but it actually eliminates one of the exceptions from the doctrine. For the typical constitutional attack on a statute focuses on one, or a few, objectionable features. Although, as Mr. Justice Black indicated in *Watson*, it is conceivable that there are some totally unconstitutional statutes, the possibility is quite remote. More importantly, the Court has never explained why all sections of any statute must be considered invalid in order to justify an injunction against a portion that is itself flagrantly unconstitutional. Even if this Court finds the constitutional issue less clear than did the District Court, I do not understand what governmental

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[7] "There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment. For example, as long ago as the *Buck* case, *supra*, we indicated:

" 'It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' 313 U. S., at 402.

"Other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be." 401 U. S., at 53–54.

interest is served by refusing to address the merits at this stage of the proceedings.

II

The Court explicitly does not decide "whether *Younger* principles apply to all civil litigation." *Ante*, at 445 n. 8. Its holding in this case therefore rests squarely on the fact that the State, rather than some other litigant, is the creditor that invoked the Illinois attachment procedure. This rationale cannot be tenable unless principles of federalism require greater deference to the State's interest in collecting its own claims than to its interest in providing a forum for other creditors in the community. It would seem rather obvious to me that the amount of money involved in any particular dispute is a matter of far less concern to the sovereign than the integrity of its own procedures. Consequently, the fact that a State is a party to a pending proceeding should make it *less* objectionable to have the constitutional issue adjudicated in a federal forum than if only private litigants were involved. I therefore find it hard to accept the Court's contrary evaluation as a principled application of the majestic language in Mr. Justice Black's *Younger* opinion.

III

The State has a valid interest in collecting taxes or other obligations. In recognition of that need and in a desire to minimize federal interference with state matters, Congress has provided that a federal court may not enjoin the collection of state taxes if the taxpayer has a "plain, speedy and efficient remedy" under state law.[8] Congress has not, however, placed any restriction on the power of a federal court to decide whether the taxpayer's remedy is, in fact, plain, speedy, and efficient.[9] Quite the contrary, by qualifying the prohibition

[8] 28 U. S. C. § 1341.

[9] Indeed, that kind of determination is routine business in a federal court. See, *e. g.*, *Tully* v. *Griffin, Inc.*, 429 U. S. 68.

against enjoining the collection of state taxes, Congress has actually directed the federal courts to review the adequacy of a taxpayer's remedies.

Moreover, the Court has repeatedly held that when a state remedy is uncertain, the federal court must provide relief. As Mr. Justice Holmes put it, "we ought not to leave the plaintiffs to a speculation upon what the State Court might say if an action at law were brought." *Wallace* v. *Hines*, 253 U. S. 66, 68.[10]

The doctrine in *Younger* developed from the same equitable principles that have been applied to interpret 28 U. S. C. § 1341.[11] In cases in which this Court has been confronted

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[10] See *Hopkins* v. *Southern Cal. Tel. Co.*, 275 U. S. 393, 400; *Mountain States Power Co.* v. *Public Service Comm'n of Montana*, 299 U. S. 167, 170 ("A 'plain, speedy, and efficient remedy' cannot be predicated upon a problematical outcome of future consideration"); *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 106. As Mr. Justice Douglas wrote: "[T]here is such uncertainty concerning the [state] remedy as to make it speculative . . . whether the State affords *full protection to the federal rights.*" *Hillsborough* v. *Cromwell*, 326 U. S. 620, 625 (emphasis added), cited with approval just this Term in *Tully* v. *Griffin, Inc.*, *supra*, at 76. In *Hillsborough*, this Court decided in the first instance that the state remedies were uncertain to the extent of being inadequate. Finally, in *Shaffer* v. *Carter*, 252 U. S. 37, 48, this Court held that even though state procedures might be adequate to remedy the federal question as to the validity of the tax, there were no procedures to remedy the federal wrong in connection with the tax-collection procedures. "Hence, on this ground at least, resort was properly had to equity for relief; and since a court of equity does not 'do justice by halves,' and will prevent, if possible, a multiplicity of suits, the jurisdiction extends to the disposition of all questions raised by the bill." *Ibid.*

[11] The equitable principles relied upon in *Younger* are of ancient vintage. In the first Judiciary Act of 1789 Congress directed that equity be withheld if a "plain, adequate and complete remedy may be had at law." In *Scott* v. *Neely*, 140 U. S. 106, 110, this Court noted that Congress' prohibition was

"declaratory of the rule obtaining and controlling in equity proceedings from the earliest period in England, and always in this country. And so

with that statutory restriction, it has not been reluctant to decide in the first instance whether a state remedy is adequate. Congress has provided no special protection from federal interference for a state agency suing to collect nontax obligations. Equitable considerations (as well as considerations of comity and federalism) do preclude unwarranted interference with litigation brought by such an agency, but surely the agency is entitled to no greater protection than the state tax collector. Nevertheless, the Court is now fashioning a nonstatutory abstention doctrine which requires even greater deference to the State as an ordinary litigant than Congress regarded as appropriate for the State's more basic fiscal needs.

IV

The Court's decision to remand this litigation to the District Court to decide whether the Illinois attachment pro-

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it has been often adjudged that whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the act of Congress to pursue his remedy in such cases in a court of equity."

One of the major cases relied upon by the Court, *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 299, held that although Congress in § 1341 had not specifically prohibited declaratory judgments concerning the validity of state statutes, nonetheless, equitable principles required the same result.

"[W]e find it unnecessary to inquire whether the words of the statute may be so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax. For we are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure." 319 U. S., at 299.

This pronouncement has been read as prohibiting declaratory judgments to the same extent as injunctive suits under § 1341. *Illinois Central R. Co.* v. *Howlett*, 525 F. 2d 178 (CA7 1975) (Sprecher, J.).

cedure provides a debtor with an appropriate forum in which to challenge the constitutionality of the Illinois attachment procedure is ironic. For that procedure includes among its undesirable features a set of rules which effectively foreclose any challenge to its constitutionality in the Illinois courts.

Although it is true that § 27 of the Illinois Attachment Act, Ill. Rev. Stat., c. 11, § 27 (1973), allows the defendant to file a motion to quash the attachment, the purpose of such a motion is to test the sufficiency and truth of the facts alleged in the affidavit or the adequacy of the attachment bond. Section 28 of the Act precludes consideration of any other issues.[12] Even if—contrary to a fair reading—the statute might be construed to allow consideration of a constitutional challenge on a motion to quash, a trial judge may summarily reject such a challenge without fear of reversal; for an order denying such a motion is interlocutory and nonappealable.[13] The ruling on the validity of an attachment does not become final until the underlying tort or contract claim is resolved. At that time the attachment issue will, of course, be moot because the prevailing party will then be entitled to the property regardless of the validity of the attachment.

Because it is so clear that the proceeding pending in the state court did not afford the appellees in this case an ade-

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[12] Section 28, Ill. Rev. Stat., c. 11, § 28 (1973), provides that "[n]o writ of attachment shall be quashed, nor the property taken thereon restored, . . . if the plaintiff . . . shall cause a legal and sufficient affidavit or attachment bond to be filed, or the writ to be amended, . . . and in that event the cause shall proceed as if such proceedings had originally been sufficient." Thus, under § 28 the only valid question raised in a proceeding concerning the attachment is whether the facts pleaded in the affidavit or writ were true. And, of course, § 28 allows amendment of any improperly pleaded writ or affidavit.

[13] *Smith* v. *Hodge*, 13 Ill. 2d 197, 148 N. E. 2d 793 (1958); *Brignall* v. *Merkle*, 296 Ill. App. 250, 16 N. E. 2d 150 (1938); *Rabits* v. *Live Oak, Perry & Gulf R. Co.*, 245 Ill. App. 589 (1927); *American Mortgage Corp.* v. *First National Mortgage Corp.*, 345 F. 2d 527, 528 (CA7 1965).

quate remedy for the violation of their federal constitutional rights,[14] the Court's disposition points up the larger problem confronting litigants who seek to challenge any state pro-

[14] In the present case, the appellees appeared on the return date of the writ of attachment, November 18, 1974 (10 days after their property had been attached), and "were informed that the matter would be continued until December 19, 1974," *ante*, at 437, 31 days later. As the opinion below points out, the person who sues out the writ of attachment has absolute discretion under § 6 of the Act, Ill. Rev. Stat., c. 11, § 6 (1973), to set the return date of the writ of attachment anywhere from 10 to 60 days after the property has been attached. 405 F. Supp., at 762. The return date appears to be the first chance an attachment can be challenged; and as this case points up, the proceedings on the return date can be summarily continued for at least a month if not longer. Thus, property may well be attached for three months or longer before even a § 27 motion will be entertained.

As the court below also noted, "[s]ection 27 . . . does not give defendant an absolute right to a hearing on the attachment issue immediately after seizure." 405 F. Supp., at 762. Indeed, the Attachment Act contains no provision for a prompt hearing on the validity of the attachment. This should be compared with § 29 of the Act, Ill. Rev. Stat., c. 11, § 29 (1973), which requires "the court [to] immediately . . . direct a jury to be impaneled to inquire into the right of the property" in cases in which a person *other than the defendant* claims an interest in the property being attached. This deference to the needs for prompt action in response to an interpleading claimant signifies the general lax attitude the Act takes with regard to the rights of persons whose property has been attached.

The Court states that the appellees (who appeared on the return date "and were informed that the matter would be continued" for a month) "did not seek a prompt hearing, nor did they attempt to quash the attachment on the ground that the procedures surrounding its issuance rendered it and the Act unconstitutional." *Ante*, at 437–438. The State suggests that § 26 of the Act, Ill. Rev. Stat., c. 11, § 26 (1973), allows appellees to make an appropriate motion that the attachment statute is unconstitutional. However, § 26 provides that "provisions of the Civil Practice Act . . . shall apply to all proceedings hereunder, *except as otherwise provided in this Act*." (Emphasis added.) As we note in our discussion of § 28, *supra*, the statute does not authorize raising unconstitutionality as a defense to an attachment.

The State also cites Ill. Sup. Ct. Rule 184, which provides that a party

cedure as violative of the Due Process Clause of the Fourteenth Amendment.

As I suggested in my separate opinion in *Juidice* v. *Vail*, 430 U. S. 327, 339, a principled application of the rationale of *Younger* v. *Harris*, 401 U. S. 37, forecloses abstention in cases in which the federal challenge is to the constitutionality of the state procedure itself.[15] Since this federal plaintiff raised

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may "call up a motion for disposition before or after" the time for its normal disposition. This, however, does not provide a prompt hearing; it only allows appellees to ask for one. The request may or may not be granted in the discretion of the court. Neither § 26 nor Rule 184 assures appellees a prompt hearing, and neither overrides the fact that § 28 appears to foreclose any defense of unconstitutionality in attacking an attachment.

[15] There should be no abstention unless the state procedure affords a plain, speedy, and efficient remedy for the federal wrong; indeed, the opinion in *Younger* in basing its decision on basic equity principles acknowledges this as the fundamental requirement in application of the abstention doctrine. The majority opinion in this case states the question presented as whether abstention is proper when a "State has already instituted proceedings . . . and the [appellees] could tender and have [their] federal claims decided in the state court." *Ante*, at 440. It then proceeds to quote from numerous cases requiring an adequate state remedy for application of the abstention doctrine. *Younger* v. *Harris*, 401 U. S. 37, 45, quoting *Fenner* v. *Boykin*, 271 U. S. 240, 243–244 (requiring the federal plaintiff to "first set up and rely on his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection"); *Gibson* v. *Berryhill*, 411 U. S. 564, 577 (dismissal of the federal suit as "naturally presuppos[ing] the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved"); *Kugler* v. *Helfant*, 421 U. S. 117, 124 (abstention founded "on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights"). *Ante*, at 441. In my judgment, when a state procedure is challenged, an adequate forum must be one that is sufficiently independent of the alleged unconstitutional procedure to judge it impartially and to provide prompt relief if the procedure is found wanting. No Illinois procedure has been pointed to as providing such relief, and where the remedy is "uncertain," federal jurisdiction exists.

a serious question about the fairness of the Illinois attachment procedure, and since that procedure does not afford a plain, speedy, and efficient remedy for his federal claim, it necessarily follows that *Younger* abstention is inappropriate.

Thirty years ago Mr. Justice Rutledge characterized a series of Illinois procedures which effectively foreclosed consideration of the merits of federal constitutional claims as a "procedural labyrinth . . . made up entirely of blind alleys." *Marino* v. *Ragen*, 332 U. S. 561, 567. Today Illinois litigants may appropriately apply that characterization to the Court's increasingly Daedalian doctrine of abstention.

I respectfully dissent.

Syllabus

OHIO BUREAU OF EMPLOYMENT SERVICES ET AL. *v.* HODORY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

No. 75-1707. Argued February 28, 1977—Decided May 31, 1977

Appellee, an employee of United States Steel Corporation (USS) at a plant in Ohio, was furloughed when the plant was shut down because of a reduction in fuel supply resulting from a nationwide strike of workers at USS's coal mines. Appellee applied to appellant Ohio Bureau of Employment Services for unemployment benefits but his claim was disallowed under an Ohio statute that disqualified a worker from such benefits if his unemployment was "due to a labor dispute other than a lockout at any factory . . . owned or operated by the employer by which he is or was last employed." While appellee's request for reconsideration was pending before the Board of Review, he filed a class action in Federal District Court against appellants, the Bureau and its director, for declaratory and injunctive relief, asserting that the Ohio statute conflicted with certain provisions of the Social Security Act (SSA) and that, as applied, it was irrational and had no valid public purpose, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Concluding that abstention was not proper, the District Court held that the statute, as applied to appellee and the class members, violated those Clauses. *Held:*

1. Abstention is not required under either *Younger* v. *Harris*, 401 U. S. 37, or *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496. Pp. 477–481.

(a) Where Ohio has concluded to submit the constitutional issue to this Court for immediate resolution, *Younger* principles of equity and comity do not require this Court to refuse Ohio the immediate adjudication it seeks. Pp. 477–480.

(b) Nor is *Pullman* abstention appropriate, where the possible benefits of abstention have become too speculative to justify or require avoidance of the constitutional question. Pp. 480–481.

2. The Ohio statute is neither in conflict with, nor is it pre-empted by 42 U. S. C. § 503 (a) (the provision of the SSA that precludes the Secretary of Labor from certifying payment of federal funds to state unemployment compensation programs unless state law provides for such methods of administration as the Secretary finds are "reasonably

calculated to insure full payment of unemployment compensation when due"), or the Federal Unemployment Tax Act (FUTA). Pp. 482–489.

3. The Ohio statute, which has a rational relation to a legitimate state interest, is constitutional. Pp. 489–493.

(a) The statute does not involve any discernible fundamental interest or affect with particularity any protected class, and the test of constitutionality, therefore, is whether the statute has a rational relation to a legitimate state interest. P. 489.

(b) In considering the constitutionality of the statute, this Court must view its consequences, not only for the recipient of the benefits, but also for the contributors to the compensation fund, and, although the system may provide only "rough justice" and a rough form of state "neutrality" in labor disputes, the statute cannot be said to be irrational, and the need for limitation of the liability of the compensation fund is a legitimate state interest. Pp. 489–493.

408 F. Supp. 1016, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which all Members joined except REHNQUIST, J., who took no part in the consideration or decision of the case.

Richard A. Szilagyi, Assistant Attorney General of Ohio, argued the cause for appellants. With him on the briefs was *William J. Brown,* Attorney General.

T. Patrick Lordeon argued the cause for appellee. With him on the brief were *Robert M. Clyde, Jr.,* and *Fred A. Culver.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents a challenge to Ohio Rev. Code Ann. § 4141.29 (D)(1)(a) (1973). That statute, at the times rele-

*Briefs of *amici curiae* urging reversal were filed by *Gerard C. Smetana, Jerry Kronenberg, Julian D. Schreiber, Lawrence B. Kraus,* and *Richard O'Brecht* for the Chamber of Commerce of the United States; and by *Frank C. Manak* for the United States Steel Corp.

J. Albert Woll and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

Walter J. Mackey filed a brief for the Republic Steel Corp. as *amicus curiae.*

vant to this suit, imposed a disqualification for unemployment benefits when the claimant's unemployment was "due to a labor dispute other than a lockout at any factory . . . owned or operated by the employer by which he is or was last employed." The challenge is based on the Supremacy Clause and on the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The case also raises questions concerning abstention.

I

In November 1974 plaintiff-appellee, Leonard Paul Hodory, was employed as a millwright apprentice with United States Steel Corporation (USS) at its works in Youngstown, Ohio. The United Mine Workers at that time were out on strike at coal mines owned by USS and by Republic Steel Corporation throughout the country. These company-owned mines supplied the fuel used in the operation of manufacturing facilities of USS and Republic. As a result of the strike, the fuel supply at the Youngstown plant was reduced. The plant eventually was shut down, and appellee was furloughed on November 12, 1974.

Hodory applied to appellant Ohio Bureau of Employment Services for unemployment benefits. On January 3, 1975, he was notified by the Bureau that his claim was disallowed under Ohio Rev. Code Ann. § 4141.29 (D)(1)(a) (1973). That statute then provided that a worker may not receive unemployment benefits if

> "[h]is unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute." [1]

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[1] In December 1975, § 4141.29 (D)(1)(a) (1973), was amended to read: "(D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:

The written notification to appellee recited: "A labor dispute started at coal mines owned and operated by U. S. Steel Corporation and claimant is unemployed because of this labor dispute." App. i. Other notifications to Hodory for subsequent unemployment weeks contained similar recitals. *Id.*, at ii and iii. Appellee promptly filed a request for reconsideration. In accord with the provisions of Ohio Rev. Code Ann. § 4141.28 (G) (1973), his request, along with a number of others, was referred on March 7 to the Board of Review.[2]

"(1) For any week with respect to which the administrator finds that:

"(a) His unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute. No individual shall be disqualified under this provision if: (i) his employment was with such employer at any factory, establishment, or premises located in this state, owned or operated by such employer, other than the factory, establishment, or premises at which the labor dispute exists, if it is shown that he is not financing, participating in, or directly interested in such labor dispute, or, (ii) his employment was with an employer not involved in the labor dispute but whose place of business was located within the same premises as the employer engaged in the dispute, unless his employer is a wholly owned subsidiary of the employer engaged in the dispute, or unless he actively participates in or voluntarily stops work because of such dispute. If it is established that the claimant was laid off for an indefinite period and not recalled to work prior to the dispute, or was separated by the employer prior to the dispute for reasons other than the labor dispute, or that he obtained a bona fide job with another employer while the dispute was still in progress, such labor dispute shall not render the employee ineligible for benefits." Act (amended substitute Senate bill 173) effective Dec. 2, 1975.

The amendment added subdivision (i). Thus it is possible that if appellee's furlough had been effected after December 2, 1975, he would qualify for benefits. We are advised, however, that the amendment is not retroactive. Tr. of Oral Arg. 16.

[2] Appellants state that these referrals are still before the Board of Review but are stayed pending decision in this case. Brief for Appellants 4.

Meanwhile, on January 27, Hodory filed a complaint in the United States District Court for the Northern District of Ohio against the Bureau and its director, Albert G. Giles. The complaint was based on 42 U. S. C. § 1983 and sought declaratory and injunctive relief on behalf of appellee and "all others similarly situated" who had been or in the future would be denied benefits under § 4141.29 (D)(1)(a). Record, Doc. 3, pp. 1 and 3. Hodory asserted, among other things, that the Ohio statute was in conflict with §§ 303 (a)(1) and (3) of the Social Security Act of 1935, as amended, 42 U. S. C. §§ 503 (a)(1) and (3), and that the statute as applied was irrational and had no valid public purpose, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[3] The gravamen of Hodory's complaint was the assertion that the State may not deny benefits to those who, like him, are unemployed under circumstances where the unemployment is "not the fault of the employee." A three-judge court was requested.

Appellants in their answer asserted, among other things, that Hodory had failed to exhaust his state administrative remedies.

A three-judge court was convened. The case was tried on the pleadings and interrogatories. In its opinion filed March 5, 1976, 408 F. Supp. 1016, that court concluded that abstention was not required and would not be proper; that the action was properly maintained as a class action;[4]

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[3] At no point in this litigation has appellee claimed that § 4141.29 (D)(1)(a) conflicts with or is pre-empted by any provision of the National Labor Relations Act, 29 U. S. C. § 151 *et seq.* We do not today consider or decide the relationship between that Act and a statute such as § 4141.29 (D)(1)(a).

[4] The District Court determined, however, that the class as defined by appellee in his complaint was overbroad. The court in its turn defined the class as "Hodory and approximately 1250 members of the United Steelworkers in Ohio, who became unemployed through no fault of their

and that the appellants had failed to demonstrate a rational and legitimate interest in discriminating against "individuals who were unemployed through no fault of their own and neither participated in nor benefited from the labor dispute involving another union and their employer." *Id.*, at 1022. The court then held that § 4141.29 (D)(1)(a), as applied to Hodory and the class members, violated the Equal Protection and Due Process Clauses.

The Bureau and its director took a direct appeal here pursuant to 28 U. S. C. § 1253. In their jurisdictional statement appellants argued only that (1) the "labor dispute" disqualification provision is not unconstitutional as applied to appellee and the class; (2) the disqualification provision is not in conflict with the Social Security Act; (3) a state system of unemployment compensation may predicate disqualification upon any reasonable basis; and (4) USS and Republic, as employers of the class members, were denied substantive and procedural due process by the failure of the District Court to order them joined as parties defendant.[5] Appellants made no claim therein based on abstention. We noted probable jurisdiction. 429 U. S. 814 (1976).

A claim that the District Court should have abstained from deciding the case has been raised, however, in the brief *amicus curiae* filed by the AFL–CIO. A like claim is at least sug-

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own, [and] were denied unemployment benefits by defendants for a specific period of time because of the labor dispute disqualification clause in § 4141.29 (D)(1)(a), despite the fact that they may have been qualified in all other respects to receive the benefits." 408 F. Supp., at 1020. Members of this class included Hodory's fellow workers at USS and also employees of Republic Steel who were furloughed as a result of the strike at Republic's coal mines.

[5] In view of our disposition of the case, we have no reason to reach this constitutional claim. USS and Republic each sought to intervene for purposes of taking an appeal here, and as parties in this Court. These motions were denied. See 429 U. S. 814 (1976).

gested by Republic Steel. Brief as *Amicus Curiae* 16–17. We feel those claims merit consideration.

We follow the proper course for federal courts by considering first whether abstention is required, then whether there is a statutory ground of resolution, and finally, only if the challenge persists, whether the statute violates the Constitution.

II

Abstention

There are, of course, two primary types of federal abstention. The first, usually referred to as *Pullman* abstention, involves an inquiry focused on the possibility that the state courts may interpret a challenged state statute so as to eliminate, or at least to alter materially, the constitutional question presented. *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941). See *Bellotti* v. *Baird*, 428 U. S. 132 (1976). The second type is *Younger* abstention, in which the court is primarily concerned, in an equitable setting, with considerations of comity and federalism, both as they relate to the State's interest in pursuing an ongoing state proceeding, and as they involve the ability of the state courts to consider federal constitutional claims in that context. *Younger* v. *Harris*, 401 U. S. 37 (1971). See *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975); *Juidice* v. *Vail*, 430 U. S. 327 (1977); *Trainor* v. *Hernandez*, *ante*, at 448 (concurring opinion).

A. In the present case, appellants, who in effect are the State of Ohio, argued before the District Court that appellee was free to pursue his pending administrative appeal and have his constitutional claim adjudicated in the Court of Common Pleas, and that principles of comity therefore required abstention.[6] Although appellants in their written submission

[6] Brief in Opposition to Jurisdiction (of the District Court), Record, Doc. 8. The defendants-appellants explicitly stated that an appeal would lie to the Court of Common Pleas. *Id.*, at 2. It appears that the Board

to that court cited *Pullman*, the argument was clearly to the effect that *Younger* abstention should apply.[7]

The District Court held that abstention was unwarranted. It first asserted that in *Gibson* v. *Berryhill*, 411 U. S. 564 (1973), this Court "stated specifically that administrative remedies need not be exhausted where the federal court plaintiff states a good cause of action under 42 U. S. C. § 1983." 408 F. Supp., at 1019.[8] The court then stated that § 4141.29 (D)(1)(a), "on its face, would appear to except the plaintiff from unemployment benefits for the period he was laid off due to coal miners' strike," and that "the Employment Bureau has denied benefits to plaintiff . . . solely on the basis of the challenged labor dispute disqualification." 408 F. Supp., at 1019. The court held that exhaustion of administrative remedies would be futile because the administrative appeal process would not permit a challenge to the constitutionality of the statute, and the Ohio courts had held the statute to be constitutional. *Id.*, at 1019, and n. 1. Although the court observed that *Huffman* v. *Pursue, Ltd.*, *supra*, broadened the *Younger* doctrine "to include a prohibition against federal court interference with certain ongoing *civil* proceedings in the state

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might give appellee's class claim special treatment so as to render the Board's decision eligible for direct review by the Supreme Court of Ohio. Ohio Rev. Code Ann. § 4141.28 (N) (1973) (claims involving more than 500 persons). Neither appellee nor appellants suggest, however, that the Board is considering such action.

[7] This is confirmed by the fact that *Younger* abstention was the sole abstention principle argued orally before the District Court. Record, Doc. 35, pp. 5–12, 27–29, and 47–49.

[8] In *Gibson* v. *Berryhill* this Court actually held, however, that the *Younger* rule "or the principles of equity, comity, and federalism" for which it stands, 411 U. S., at 575, did not require the dismissal of that § 1983 suit in view of a proceeding then pending before a state Board of Optometry, since it was alleged, and the District Court there had concluded, that the Board's bias rendered it incompetent to adjudicate the issues. 411 U. S., at 575–577.

courts," 408 F. Supp., at 1019–1020, the court held that *Huffman* "was limited to the enjoining of ongoing state-initiated *judicial* proceedings," 408 F. Supp., at 1020 (emphasis in original), and did not apply to a challenge to administrative actions. Finally, the court held that abstention, along the *Pullman* line, "would not be proper in this case" because the challenged statute is not an ambiguous one "involving unsettled questions of state law which could be rendered constitutionally inoffensive by a limiting construction in the state courts." 408 F. Supp., at 1020. The court concluded that it would be improper to require the appellee "to undertake three administrative appeals" [9] before he could challenge the statute in state court "where, moreover, the issue as to the constitutionality of the labor dispute disqualification has apparently been settled." *Ibid.*

In this Court, as has been noted, appellants have not argued that *Younger* requires a remand with directions to the District Court to abstain, and at oral argument they resisted the suggestion of such a remand. Tr. of Oral Arg. 9–10. Instead, it is *amicus* Republic Steel that has made the suggestion.

Younger v. *Harris* reflects "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." 401 U. S., at 44. See *Huffman* v. *Pursue, Ltd.*, 420 U. S., at 604; *Juidice* v. *Vail*, 430 U. S., at 334; *Trainor* v. *Hernandez, ante*, at 441–443, 445–446, and *id.*, at 448 (concurring opinion). *Younger* and these cited cases express equitable principles of comity and federalism. They are designed to allow the State an opportunity to "set its own

[9] The nature of the three appeals is not made clear. It is possible that a more expeditious route was available. See n. 6, *supra*.

house in order" when the federal issue is already before a state tribunal.

It may not be argued, however, that a federal court is compelled to abstain in every such situation. If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system. In the present case, Ohio either believes that the District Court was correct in its analysis of abstention or, faced with the prospect of lengthy administrative appeals followed by equally protracted state judicial proceedings, now has concluded to submit the constitutional issue to this Court for immediate resolution. In either event, under these circumstances *Younger* principles of equity and comity do not require this Court to refuse Ohio the immediate adjudication it seeks.[10]

B. *Amicus* AFL–CIO argues that *Pullman* abstention is proper here.[11] The basis for the claimed applicability of *Pullman* is found in the facts that there were other steelworkers, at other Ohio facilities, laid off at the same time as appellee and assertedly for the same reason, and yet they were awarded unemployment compensation by the Bureau. See Brief for Appellants 3. Benefits were granted on the ground that the company-owned coal mines did not supply a sufficient amount of fuel to the plants there involved to effect a plant shutdown.[12] *Amicus* argues that if appellee

[10] In view of this conclusion, we need not and do not express any view on whether the District Court erred in refusing to abstain on *Younger* grounds.

[11] *Pullman* abstention, where deference to the state process may result in elimination or material alteration of the constitutional issue, surely does not require that this Court defer to the wishes of the parties concerning adjudication. See *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941).

[12] It appears that the steel companies have taken an appeal from that ruling by the Bureau to the Board of Review, but decision of that appeal has been withheld pending resolution of the instant case. See Brief for AFL–CIO as *Amicus Curiae* 5 n. 3.

were to pursue his administrative appeal, he might be granted benefits on the same ground.

The problems with this approach, however, are several. First, appellee did not press any such claim before the Bureau or on administrative appeal, Tr. of Oral Arg. 9, and there is no indication that a claimant may be awarded benefits on the basis of a claim not made to the Bureau or Board of Review. Second, there is no indication that the plant at which appellee worked is situated similarly to the plants as to which benefits were granted. The Bureau apparently applied a test under which the closing of a plant was held not to be "due to" the labor dispute if the plant received less than 50% of its coal from the employer's struck mines. *Id.*, at 7–8. There has been no claim or showing that the 50% test is unreasonable or improper and there has been no claim that appellee's plant was not dependent on the struck mines for more than 50% of its coal. What *amicus* suggests is that the court abstain on the basis of speculation that the unchallenged facts may not be as the Bureau obviously saw them, or that the Board might overturn an unchallenged standard of causation, or that the Board might even come up with a hitherto unknown and unclaimed reason for awarding benefits to appellee, such as a theory that because the coal strike was nationwide it was not "*'at the employers' mines.'*" See Brief for AFL–CIO as *Amicus Curiae* 8.

None of these suggestions is based on fact or solid legal precedent. As has been noted, *Pullman* abstention is an equitable doctrine that comes into play when it appears that abstention may eliminate or materially alter the constitutional issue presented. There is a point, however, at which the possible benefits of abstention become too speculative to justify or require avoidance of the question presented. That point has been reached and surpassed here. We conclude that *Pullman* abstention is not appropriate.

III

Pre-emption

Appellee argues that the Ohio statute is in conflict with, or pre-empted by, certain provisions of the Social Security Act, 42 U. S. C. § 501 *et seq.*, and the Federal Unemployment Tax Act, 26 U. S. C. §§ 3301–3311. This argument was raised in the District Court but was not resolved there. It would have been preferable, of course, for that court to have dealt with this statutory issue first. See *Hagans* v. *Lavine*, 415 U. S. 528, 543–545 (1974). The issue, however, entails no findings of fact and has been fully briefed here by both parties. We therefore perceive no need to remand to the District Court, and we proceed to decide the question.

Appellee points to two statutes as the source of his claimed federal requirement that he be paid unemployment compensation. The first is 42 U. S. C. § 503 (a)(1), to the effect that the Secretary of Labor shall make no certification for payment of federal funds to state unemployment compensation programs unless state law provides for such methods of administration "as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due." Appellee's argument necessarily is that payment is "due" him.

Appellee cites only a single page of the voluminous legislative history of the Social Security Act in support of his assertion that the Act forbids disqualification of persons laid off due to a labor dispute at a related plant. That page contains the sentence: "To serve its purposes, unemployment compensation must be paid only to workers involuntarily unemployed." Report of the Committee on Economic Security, as reprinted in Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 1311, 1328 (1935).

The cited Report was one to the President of the United States and became the cornerstone of the Social Security Act. On its face, the quoted sentence may be said to give

some support to appellee's claim that "involuntariness" was intended to be the key to eligibility. A reading of the entire Report and consideration of the sentence in context, however, show that Congress did not intend to require that the States give coverage to every person involuntarily unemployed.

The Report recognized that federal definition of the scope of coverage would probably prove easier to administer than individualized state plans, *id.*, at 1323, but it nonetheless recommended the form of unemployment compensation scheme that exists today, namely, federal involvement primarily through tax incentives to encourage state-run programs. The Report's section entitled "Outline of Federal Act" concludes with the statement:

> "The plan for unemployment compensation that we suggest contemplates that the States shall have broad freedom to set up the type of unemployment compensation they wish. We believe that all matters in which uniformity is not absolutely essential should be left to the States. The Federal Government, however, should assist the States in setting up their administrations and in the solution of the problems they will encounter." *Id.*, at 1326.

See also *id.*, at 1314.

Following this statement, the Report contains a section entitled "Suggestions for State Legislation." It reads:

> "*Benefits.*—The States should have freedom in determining their own waiting periods, benefit rates, maximum-benefit periods, etc. We suggest caution lest they insert benefit provisions in excess of collections in their laws. To arouse hopes of benefits which cannot be fulfilled is invariably bad social and governmental policy." *Id.*, at 1327.

This statement reflects two things. First, it reflects the understanding that unemployment compensation schemes

generally do not grant full benefits immediately and indefinitely, even to those involuntarily unemployed. The States were expected to create waiting periods, benefit rates, and maximum-benefit periods, so as to bring the amount paid out in line with receipts. Second, the statement reflects concern that the States might grant eligibility greater than their funds could handle.

By way of advice on particular statutes, the Report's "Suggestions" contains the following:

> "*Willingness-to-work test.*—To serve its purposes, unemployment compensation must be paid only to workers involuntarily unemployed. The employees compensated must be both able and willing to work and must be denied benefits if they refuse to accept other suitable employment. Workers, however, should not be required to accept positions with wage, hour, or working conditions below the usual standard for the occupation or the particular region, or outside of the State, or where their rights of self-organization and collective bargaining would be interfered with." *Id.*, at 1328.

This, as has been noted, is the origin of appellee's argument that all persons involuntarily unemployed were intended to be compensated. Placed in context, however, it is clear that the single sentence is only an expression of caution that funds should not be dispensed too freely, and is not a direction that funds must be dispensed.

Appellee's claim of support in the legislative history accordingly fails. Indeed, that history shows, rather, that Congress did not intend to restrict the ability of the States to legislate with respect to persons in appellee's position. See also H. R. Rep. No. 615, 74th Cong., 1st Sess., 8–9 (1935); S. Rep. No. 628, 74th Cong., 1st Sess., 12–13 (1935).

Appellee would find support in the "labor dispute disqualification" contained in § 5 (d) of draft bills issued by the Social Security Board shortly after passage of the Social Se-

curity Act. Social Security Board, Draft Bills for State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types (1936).[13] Appellee argues that this proposed section evinced an intention that "innocent" persons not be disqualified from unemployment compensation. The Social Security Board, however, on the cover page of the draft bills booklet explicitly stated:

> "These drafts are merely suggestive . . . . Therefore, they cannot properly be termed 'model' bills or even recommended bills. This is in keeping with the policy of the Social Security Board of recognizing that it is the final responsibility and the right of each state to determine for itself just what type of legislation it desires and how it shall be drafted."

We therefore are most reluctant to read implications of the draft bills into the Social Security Act.

More important, however, appellee's argument fails on its face. The draft bills themselves denied "innocents" certain compensation. They did so not only in the various provisions

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[13] Section 5 (d) of those bills provided that a claimant is disqualified:

"For any week in which it is found by the commission that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to the satisfaction of the commission that:

"1. He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

"2. He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute;

"and provided further that if in any case separate branches of work, which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the same premises, each such department shall for the purposes of this subsection be deemed to be a separate factory, establishment or other premises."

as to minimum time spent at the job, waiting periods, and maximum benefits, but also in the labor dispute disqualification itself. The labor dispute provisions are triggered by a dispute at the same "establishment" and they disqualify any member of a "grade or class of workers" any of whose members were interested in the dispute. As the commentary and case law in jurisdictions that adopted versions of the draft bills immediately recognized, this division could serve to disqualify even a person who actively opposed a strike and could extend to persons laid off because of a dispute at another plant owned by the same employer.[14]

The law that appellee challenges is different in form from the draft bills, but we cannot say that it is qualitatively different. We do not find in the draft bills any significant support for appellee's argument that the Social Security Act forbids his disqualification from benefits.

Appellee also claims support from this Court's decision in *California Human Resources Dept.* v. *Java*, 402 U. S. 121 (1971). In that case the Court held that the requirement of 42 U. S. C. § 503 (a)(1) that payments be made "when due" forbids suspension of payments during an appeal subsequent to a full consideration on the merits. Appellee relies on the Court's statement: "The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee." 402 U. S., at 130. Appellee argues that this statement is a holding that the Act forbids disqualification of persons in his position. We do not agree. Nothing in *Java* purported to define the class of persons eli-

[14] See Fierst & Spector, Unemployment Compensation in Labor Disputes, 49 Yale L. J. 461 (1940); Haggart, Unemployment Compensation During Labor Disputes, 37 Neb. L. Rev. 668 (1958); Shadur, Unemployment Benefits and the "Labor Dispute" Disqualification, 17 U. Chi. L. Rev. 294 (1950); Comment, Labor Dispute Disqualification Under the Ohio Unemployment Compensation Act, 10 Ohio St. L. J. 238 (1949), and cases cited therein. See generally Annot., 63 A. L. R. 3d 88 (1975).

gible for benefits. The Court's sole concern there was with the treatment of those who already had been determined under state law to be eligible.

Finally, appellee argues that statements in the legislative history of the Employment Security Amendments of 1970, 84 Stat. 695, indicate a congressional understanding that persons in his position must not be disqualified. These statements (identical in both House and Senate Reports) relate to the amendment prohibiting States from canceling accumulated wage credits on grounds such as an employee's change of jobs.[15] The statements are concerned with a situation unrelated to the one in which appellee finds himself. To the extent that they might be seen as shedding light on the area, they are far from persuasive authority in appellee's favor, since they recognize that the States continue to be free to disqualify a claimant whose unemployment is due to a labor dispute "in the worker's plant, etc."

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[15] The statements read:

"The provision [forbidding cancellation] would not restrict State authority to prescribe the conditions under which a claimant would be 'otherwise eligible.' For example, benefits are not now—and would not under the proposal be—paid for a week of unemployment unless the claimant were available for work. It would not prevent a State from specifying the conditions for disqualification such as, for refusing suitable work, for voluntary quitting, for unemployment due to a labor dispute in the worker's plant, etc. . . .

. . . . . .

"Your [in the Senate report this word is 'the'] committee believes that the disqualification provisions of State unemployment compensation laws should be devised so as to prevent benefit payments to those responsible for their own unemployment, without undermining the basic objective of the unemployment insurance system—to provide an income floor to those whose unemployment is beyond their control. Severe disqualifications, particularly those which cancel earned monetary entitlement, are not in harmony with the basic purposes of an unemployment insurance system." H. R. Rep. No. 91–612, pp. 18–19 (1969); S. Rep. No. 91–752, pp. 23–24 (1970).

As an alternative or addition to his argument based on the Social Security Act, appellee urges that the Federal Unemployment Tax Act, 26 U. S. C. §§ 3301–3311, as amended, shows "congressional intent to pre-empt the state, particularly with respect to the scope of inclusiveness in the unemployment program." Brief for Appellee 13. We do not understand appellee to argue that the States are pre-empted by the Federal Unemployment Tax Act from imposing any sort of labor dispute disqualification. If total pre-emption is not claimed, we find nothing in any of appellee's citations that would show pre-emption in the particular area of concern to him. Indeed, study of the various provisions cited shows that when Congress wished to impose or forbid a condition for compensation, it was able to do so in explicit terms.[16] There are numerous examples, in addition to the one set forth in n. 16, less related to labor disputes but showing congressional ability to deal with specific aspects of state plans.[17] The fact that Congress has chosen not to legislate on the subject of labor dispute disqualifications confirms our belief that neither the

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[16] See, for example, 26 U. S. C. § 3304 (a) (5), which from the start has provided:

"(5) compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

"(A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;

"(B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

"(C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization."

[17] See Employment Security Amendments of 1970, 84 Stat. 695; Emergency Unemployment Compensation Act of 1971, 85 Stat. 811; Emergency Unemployment Compensation Act of 1974, 88 Stat. 1869; Unemployment Compensation Amendments of 1976, 90 Stat. 2667.

Social Security Act nor the Federal Unemployment Tax Act was intended to restrict the States' freedom to legislate in this area.

IV

Constitutionality

We come, then, to the question whether the Ohio labor dispute disqualification provision is constitutional. The statute does not involve any discernible fundamental interest or affect with particularity any protected class. Appellee concedes that the test of constitutionality, therefore, is whether the statute has a rational relation to a legitimate state interest. Brief for Appellee 29. See *New Orleans* v. *Dukes*, 427 U. S. 297 (1976). Our statement last Term in *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307 (1976), explains the analysis:

> "We turn then to examine this state classification under the rational-basis standard. This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. *Dandridge* v. *Williams*, [397 U. S. 471,] 485 [(1970)]. Such action by a legislature is presumed to be valid." *Id.*, at 314.

Appellee challenges the statute only in its application to persons in his situation. We find it difficult, however, to discern the precise nature of the situation that appellee claims may not be the subject of disqualification. His discussion focuses to a great extent on his claim that he is "involuntarily unemployed," but he cannot be arguing that no person involuntarily unemployed may be disqualified, for he approves the draft bills' labor dispute provision. Brief for Appellee 53. That provision, as discussed above, would disqualify an involuntarily unemployed nonunion worker who opposed a strike

but whose grade or class of workers nevertheless went out on strike.

Appellee's claim of irrationality appears to be based, rather, on his view of the statute's broad sweep, in that it disqualifies an individual "regardless of the geographical remoteness of the location of the dispute, and regardless of any arguable actual, or imputable, participation or direct interest in the dispute on the part of the disqualified person." [18] *Id.*, at 34. Appellee thus focuses on the interests of the recipient of unemployment compensation.

The unemployment compensation statute, however, touches upon more than just the recipient. It provides for the creation of a fund produced by contributions from private employers. The rate of an employer's contribution to the fund varies according to benefits paid to that employer's eligible employees. Ohio Rev. Code Ann. § 4141.25 (1973). Any action with regard to disbursements from the unemployment compensation fund thus will affect both the employer and the fiscal integrity of the fund. Appellee in effect urges that the Court consider only the needs of the employee seeking compensation. The decision of the weight to be given the various effects of the statute, however, is a legislative decision, and appellee's position is contrary to the principle that "the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Dandridge* v. *Williams*, 397 U. S. 471, 486

[18] Appellee also claims that § 4141.29 (D) (1) (a) creates an impermissible "irrebuttable presumption." This argument requires two assumptions. First, appellee must assume that the only purpose of the statute is to measure "innocence." Then he must assume that the disqualification provision represents a presumption that any person laid off due to a strike is not innocent. If the statute is designed to serve any purpose other than measuring innocence, appellee's implication of an irrebuttable presumption fails. As we discuss below, the statute clearly has purposes other than measuring the innocence of the disqualified worker.

(1970). In considering the constitutionality of the statute, therefore, the Court must view its consequences, not only for the recipient of benefits, but also for the contributors to the fund and for the fiscal integrity of the fund.

Looking only at the face of the statute, an acceptable rationale immediately appears. The disqualification is triggered by "a labor dispute other than a lockout." In other words, if a union goes on strike, the employer's contributions are not increased, but if the employer locks employees out, all his employees thus put out of work are compensated and the employer's contributions accordingly are increased. Although one might say that this system provides only "rough justice," its treatment of the employer is far from irrational. "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78." *Dandridge* v. *Williams*, 397 U. S. at 485. The rationality of this treatment is, of course, independent of any "innocence" of the workers collecting compensation.

Appellants assert three additional rationales for the disqualification provision. First, they argue that granting benefits to workers laid off due to a strike at a parent company's subsidiary plant in effect would be subsidizing the union members. Brief for Appellants 12. The District Court correctly rejected this rationale, as applied to appellee and his class, because payments to appellee would in no way directly subsidize the striking coal miners, and the fact that appellee happened to be a member of a union (other than the striking union) is not a legitimate reason, standing alone, to deny him benefits. 408 F. Supp., at 1022. The court continued:

> "Moreover, close scrutiny of the reasons for the State's classification reveals that what the state is actually intend-

> ing to prevent is not the 'subsidizing' of unemployed *union members* per se, but the subsidizing of union-initiated work stoppages" (emphasis in original). *Ibid.*

This statement of the State's purpose reflects its second proffered justification, namely, that the granting of benefits would place the employer at an unfair disadvantage in negotiations with the unions. The District Court rejected this justification on the grounds that payments of funds to the steelworkers

> "could hardly be deemed to put the coal miners in a position to refuse to negotiate with the steel companies until the companies reached a financial crisis, thereby causing the companies to yield to the unreasonable and economically unsound demands of the coal miners to prevent bankruptcy." *Ibid.*

Although the District Court was reacting to appellants' own hyperbole in speaking of financial crises and bankruptcy, it must be recognized that effects less than pushing the employer to bankruptcy may be rationally viewed as undesirable. The employer's costs go up with every laid-off worker who is qualified to collect unemployment. The only way for the employer to stop these rising costs is to settle the strike so as to return the employees to work. Qualification for unemployment compensation thus acts as a lever increasing the pressures on an employer to settle a strike. The State has chosen to leave this lever in existence for situations in which the employer has locked out his employees, but to eliminate it if the union has made the strike move. Regardless of our views of the wisdom or lack of wisdom of this form of state "neutrality" in labor disputes, we cannot say that the approach taken by Ohio is irrational.

The third rationale offered by the State is its interest in protecting the fiscal integrity of its compensation fund. This has been a continuing concern of Congress and the States with regard to unemployment compensation systems. See Report

of the Committee on Economic Security, cited *supra*, at 482; Hearing on H. R. 6900 before the Senate Committee on Finance, 94th Cong., 1st Sess. (1975). It is clear that protection of the fiscal integrity of the fund is a legitimate concern of the State. We need not consider whether it would be "rational" for the State to protect the fund through a random means, such as elimination from coverage of all persons with an odd number of letters in their surnames. Here, the limitation of liability tracks the reasons found rational above, and the need for such limitation unquestionably provides the legitimate state interest required by the equal protection equation.

The District Court's opinion contains a paragraph declaring that, in addition to violating the Equal Protection Clause, the disqualification denied appellee due process. 408 F. Supp., at 1022. There is, however, no claim of denial of procedural due process, cf. *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), and we are unable to discern the basis for a claim that appellee has been denied substantive due process.

The judgment of the District Court is reversed.

It is so ordered.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MOORE *v.* CITY OF EAST CLEVELAND, OHIO

APPEAL FROM THE COURT OF APPEALS OF OHIO, CUYAHOGA COUNTY

No. 75-6289. Argued November 2, 1976—Decided May 31, 1977

Appellant lives in her East Cleveland, Ohio, home with her son and two grandsons (who are first cousins). An East Cleveland housing ordinance limits occupancy of a dwelling unit to members of a single family, but defines "family" in such a way that appellant's household does not qualify. Appellant was convicted of a criminal violation of the ordinance. Her conviction was upheld on appeal over her claim that the ordinance is unconstitutional. Appellee city contends that the ordinance should be sustained under *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, which upheld an ordinance imposing limits on the types of groups that could occupy a single dwelling unit. *Held:* The judgment is reversed. Pp. 498–506; 513–521.

Reversed.

MR. JUSTICE POWELL, joined by MR JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, concluded that the ordinance deprived appellant of her liberty in violation of the Due Process Clause of the Fourteenth Amendment.

(a) This case is distinguishable from *Belle Terre, supra*, where the ordinance affected only unrelated individuals. The ordinance here expressly selects certain categories of relatives who may live together and declares that others may not, in this instance making it a crime for a grandmother to live with her grandson. Pp. 498–499.

(b) When the government intrudes on choices concerning family living arrangements, the usual deference to the legislature is inappropriate; and the Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation. P. 499.

(c) The ordinance at best has but a tenuous relationship to the objectives cited by the city: avoiding overcrowding, traffic congestion, and an undue financial burden on the school system. Pp. 499–500.

(d) The strong constitutional protection of the sanctity of the family established in numerous decisions of this Court extends to the family choice involved in this case and is not confined within an arbitrary boundary drawn at the limits of the nuclear family (essentially a couple

and their dependent children). Appropriate limits on substantive due process come not from drawing arbitrary lines but from careful "respect for the teachings of history [and] solid recognition of the basic values that underlie our society." *Griswold* v. *Connecticut*, 381 U. S. 479, 501 (Harlan, J., concurring). The history and tradition of this Nation compel a larger conception of the family. Pp. 500–506.

MR. JUSTICE STEVENS concluded that under the limited standard of review preserved in *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, and *Nectow* v. *Cambridge*, 277 U. S. 183, before a zoning ordinance can be declared unconstitutional it must be shown to be clearly arbitrary and unreasonable as having no substantial relation to the public health, safety, morals, or general welfare; that appellee city has failed totally to explain the need for a rule that would allow a homeowner to have grandchildren live with her if they are brothers but not if they are cousins; and that under that standard appellee city's unprecedented ordinance constitutes a taking of property without due process and without just compensation. Pp. 513–521.

POWELL, J., announced the judgment of the Court and delivered an opinion in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined, *post*, p. 506. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 513. BURGER, C. J., filed a dissenting opinion, *post*, p. 521. STEWART, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 531. WHITE, J., filed a dissenting opinion, *post*, p. 541.

Edward R. Stege, Jr., argued the cause for appellant. With him on the brief were *Francis D. Murtaugh, Jr.*, and *Lloyd B. Snyder*.

Leonard Young argued the cause for appellee. With him on the brief was *Henry B. Fischer*.*

MR. JUSTICE POWELL announced the judgment of the Court, and delivered an opinion in which MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN joined.

East Cleveland's housing ordinance, like many throughout the country, limits occupancy of a dwelling unit to members

**Melvin L. Wulf* and *Benjamin Sheerer* filed a brief for the American Civil Liberties Union et al. as *amici curiae*.

of a single family. § 1351.02.[1] But the ordinance contains an unusual and complicated definitional section that recognizes as a "family" only a few categories of related individuals. § 1341.08.[2] Because her family, living together in her home, fits none of those categories, appellant stands convicted of a criminal offense. The question in this case is whether the ordinance violates the Due Process Clause of the Fourteenth Amendment.[3]

I

Appellant, Mrs. Inez Moore, lives in her East Cleveland home together with her son, Dale Moore, Sr., and her two grandsons, Dale, Jr., and John Moore, Jr. The two boys are first cousins rather than brothers; we are told that John

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[1] All citations by section number refer to the Housing Code of the city of East Cleveland, Ohio.

[2] Section 1341.08 (1966) provides:

"'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

"(a) Husband or wife of the nominal head of the household.

"(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

"(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

"(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

"(e) A family may consist of one individual."

[3] Appellant also claims that the ordinance contravenes the Equal Protection Clause, but it is not necessary for us to reach that contention.

came to live with his grandmother and with the elder and younger Dale Moores after his mother's death.[4]

In early 1973, Mrs. Moore received a notice of violation from the city, stating that John was an "illegal occupant" and directing her to comply with the ordinance. When she failed to remove him from her home, the city filed a criminal charge. Mrs. Moore moved to dismiss, claiming that the ordinance was constitutionally invalid on its face. Her motion was overruled, and upon conviction she was sentenced to five days in jail and a $25 fine. The Ohio Court of Appeals affirmed after giving full consideration to her constitutional claims,[5]

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[4] Brief for Appellant 4, 25. John's father, John Moore, Sr., has apparently been living with the family at least since the time of trial. Whether he was living there when the citation was issued is in dispute. Under the ordinance his presence too probably would be a violation. But we take the case as the city has framed it. The citation that led to prosecution recited only that John Moore, Jr., was in the home in violation of the ordinance.

[5] The dissenting opinion of THE CHIEF JUSTICE suggests that Mrs. Moore should be denied a hearing in this Court because she failed to seek discretionary administrative relief in the form of a variance, relief that is no longer available. There are sound reasons for requiring exhaustion of administrative remedies in some situations, but such a requirement is wholly inappropriate where the party is a *criminal defendant* in circumstances like those present here. See generally *McKart* v. *United States*, 395 U. S. 185 (1969). Mrs. Moore defends against the State's prosecution on the ground that the ordinance is facially invalid, an issue that the zoning review board lacks competency to resolve. In any event, this Court has never held that a general principle of exhaustion could foreclose a criminal defendant from asserting constitutional invalidity of the statute under which she is being prosecuted. See, *e. g.*, *Yakus* v. *United States*, 321 U. S. 414, 446–447 (1944).

Moreover, those cases that have denied certain nonconstitutional defenses to criminal defendants for failure to exhaust remedies did so pursuant to statutes that implicitly or explicitly mandated such a holding. See, *e. g.*, *Falbo* v. *United States*, 320 U. S. 549 (1944); *Yakus* v. *United States*, *supra*; *McGee* v. *United States*, 402 U. S. 479 (1971). Because of the statutes the defendants were on notice that failure to pursue avail-

and the Ohio Supreme Court denied review. We noted probable jurisdiction of her appeal, 425 U. S. 949 (1976).

II

The city argues that our decision in *Village of Belle Terre* v. *Boraas*, 416 U. S. 1 (1974), requires us to sustain the ordinance attacked here. Belle Terre, like East Cleveland, imposed limits on the types of groups that could occupy a single dwelling unit. Applying the constitutional standard announced in this Court's leading land-use case, *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926),[6] we sustained the Belle Terre ordinance on the ground that it bore a rational relationship to permissible state objectives.

But one overriding factor sets this case apart from *Belle Terre*. The ordinance there affected only *unrelated* individuals. It expressly allowed all who were related by "blood, adoption, or marriage" to live together, and in sustaining the ordinance we were careful to note that it promoted "family needs" and "family values." 416 U. S., at 9. East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. This is no mere incidental result of the ordinance. On its face it selects cer-

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able administrative relief might result in forfeiture of a defense in an enforcement proceeding. But here no Ohio statute or ordinance required exhaustion or gave Mrs. Moore any such warning. Indeed, the Ohio courts entertained all her claims, perceiving no denigration of state administrative process in according full judicial review.

[6] *Euclid* held that land-use regulations violate the Due Process Clause if they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." 272 U. S., at 395. See *Nectow* v. *Cambridge*, 277 U. S. 183, 188 (1928). Later cases have emphasized that the general welfare is not to be narrowly understood; it embraces a broad range of governmental purposes. See *Berman* v. *Parker*, 348 U. S. 26 (1954). But our cases have not departed from the requirement that the government's chosen means must rationally further some legitimate state purpose.

tain categories of relatives who may live together and declares that others may not. In particular, it makes a crime of a grandmother's choice to live with her grandson in circumstances like those presented here.

When a city undertakes such intrusive regulation of the family, neither *Belle Terre* nor *Euclid* governs; the usual judicial deference to the legislature is inappropriate. "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 639–640 (1974). A host of cases, tracing their lineage to *Meyer* v. *Nebraska*, 262 U. S. 390, 399–401 (1923), and *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (1925), have consistently acknowledged a "private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944). See, *e. g.*, *Roe* v. *Wade*, 410 U. S. 113, 152–153 (1973); *Wisconsin* v. *Yoder*, 406 U. S. 205, 231–233 (1972); *Stanley* v. *Illinois*, 405 U. S. 645, 651 (1972); *Ginsberg* v. *New York*, 390 U. S. 629, 639 (1968); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *id.*, at 495–496 (Goldberg, J., concurring); *id.*, at 502–503 (WHITE, J., concurring); *Poe* v. *Ullman*, 367 U. S. 497, 542–544, 549–553 (1961) (Harlan, J., dissenting); cf. *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967); *May* v. *Anderson*, 345 U. S. 528, 533 (1953); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942). Of course, the family is not beyond regulation. See *Prince* v. *Massachusetts*, *supra*, at 166. But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation. See *Poe* v. *Ullman*, *supra*, at 554 (Harlan, J., dissenting).

When thus examined, this ordinance cannot survive. The city seeks to justify it as a means of preventing over-

crowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on East Cleveland's school system. Although these are legitimate goals, the ordinance before us serves them marginally, at best.[7] For example, the ordinance permits any family consisting only of husband, wife, and unmarried children to live together, even if the family contains a half dozen licensed drivers, each with his or her own car. At the same time it forbids an adult brother and sister to share a household, even if both faithfully use public transportation. The ordinance would permit a grandmother to live with a single dependent son and children, even if his school-age children number a dozen, yet it forces Mrs. Moore to find another dwelling for her grandson John, simply because of the presence of his uncle and cousin in the same household. We need not labor the point. Section 1341.08 has but a tenuous relation to alleviation of the conditions mentioned by the city.

III

The city would distinguish the cases based on *Meyer* and *Pierce*. It points out that none of them "gives grandmothers any fundamental rights with respect to grandsons," Brief for Appellee 18, and suggests that any constitutional right to live together as a family extends only to the nuclear family—essentially a couple and their dependent children.

To be sure, these cases did not expressly consider the family relationship presented here. They were immediately concerned with freedom of choice with respect to childbearing, *e. g., LaFleur, Roe* v. *Wade, Griswold, supra,* or with the rights

[7] It is significant that East Cleveland has another ordinance specifically addressed to the problem of overcrowding. See *United States Dept. of Agriculture* v. *Moreno,* 413 U. S. 528, 536–537 (1973). Section 1351.03 limits population density directly, tying the maximum permissible occupancy of a dwelling to the habitable floor area. Even if John, Jr., and his father both remain in Mrs. Moore's household, the family stays well within these limits.

of parents to the custody and companionship of their own children, *Stanley* v. *Illinois, supra,* or with traditional parental authority in matters of child rearing and education. *Yoder, Ginsberg, Pierce, Meyer, supra.* But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.

Understanding those reasons requires careful attention to this Court's function under the Due Process Clause. Mr. Justice Harlan described it eloquently:

> "Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.[8] No formula could serve as a substitute, in this area, for judgment and restraint.

[8] This explains why *Meyer* and *Pierce* have survived and enjoyed frequent reaffirmance, while other substantive due process cases of the same era have been repudiated—including a number written, as were *Meyer* and *Pierce,* by Mr. Justice McReynolds.

> ". . . [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe* v. *Ullman, supra,* at 542–543 (dissenting opinion).

Substantive due process has at times been a treacherous field for this Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court.[9] That history counsels caution and restraint. But it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family.

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[9] *Lochner* v. *New York,* 198 U. S. 45 (1905). See *North Dakota Pharmacy Bd.* v. *Snyder's Drug Stores, Inc.,* 414 U. S. 156, 164–167 (1973); *Griswold* v. *Connecticut,* 381 U. S. 479, 514–527 (1965) (Black, J., dissenting); *Ferguson* v. *Skrupa,* 372 U. S. 726 (1963); *Baldwin* v. *Missouri,* 281 U. S. 586, 595 (1930) (Holmes, J., dissenting); G. Gunther, Cases and Materials on Constitutional Law 550–596 (9th ed. 1975).

Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful "respect for the teachings of history [and] solid recognition of the basic values that underlie our society." [10] *Griswold* v. *Connecticut*, 381 U. S., at 501 (Harlan, J., concurring).[11] See generally *Ingraham* v. *Wright*, 430 U. S. 651, 672–674, and nn. 41, 42 (1977); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 162–163 (1951) (Frankfurter, J., concurring); *Lochner* v. *New York*, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting). Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.[12] It is through the family that we inculcate and

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[10] A similar restraint marks our approach to the questions whether an asserted substantive right is entitled to heightened solicitude under the Equal Protection Clause because it is "explicitly or implicitly guaranteed by the Constitution," *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 33–34 (1973), and whether or to what extent a guarantee in the Bill of Rights should be "incorporated" in the Due Process Clause because it is "necessary to an Anglo-American regime of ordered liberty." *Duncan* v. *Louisiana*, 391 U. S. 145, 149–150, n. 14 (1968); see *Johnson* v. *Louisiana*, 406 U. S. 356, 372 n. 9 (1972) (opinion of POWELL, J.).

[11] For a recent suggestion that the holding in *Griswold* is best understood in this fashion, see Pollak, Comment, 84 Yale L. J. 638, 650–653 (1975). "[I]n due course we will see *Griswold* as a reaffirmation of the Court's continuing obligation to test the justifications offered by the state for state-imposed constraints which significantly hamper those modes of individual fulfillment which are at the heart of a free society." *Id.*, at 653.

[12] In *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972), the Court rested its holding in part on the constitutional right of parents to assume the primary role in decisions concerning the rearing of their children. That right is recognized because it reflects a "strong tradition" founded on "the history and culture of Western civilization," and because the parental role "is now established beyond debate as an enduring American tradition." *Id.*, at 232. In *Ginsberg* v. *New York*, 390 U. S. 629 (1968), the Court spoke of the same right as "basic in the structure of our society." *Id.*, at 639. *Griswold* v. *Connecticut*, *supra*, struck down Connecticut's anticon-

pass down many of our most cherished values, moral and cultural.[13]

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.[14] Over the years millions

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traception statute. Three concurring Justices, relying on both the Ninth and Fourteenth Amendments, emphasized that "the traditional relation of the family" is "a relation as old and as fundamental as our entire civilization." 381 U. S., at 496 (Goldberg, J., joined by Warren, C. J., and BRENNAN, J., concurring). Speaking of the same statute as that involved in *Griswold*, Mr. Justice Harlan wrote, dissenting in *Poe* v. *Ullman*, 367 U. S. 497, 551–552 (1961): "[H]ere we have not an intrusion into the home so much as on the life which characteristically has its place in the home. . . . The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right."

Although he agrees that the Due Process Clause has substantive content, MR. JUSTICE WHITE in dissent expresses the fear that our recourse to history and tradition will "broaden enormously the horizons of the Clause." *Post*, at 549–550. To the contrary, an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on the abstract formula taken from *Palko* v. *Connecticut*, 302 U. S. 319 (1937), and apparently suggested as an alternative. Cf. *Duncan* v. *Louisiana*, *supra*, at 149–150, n. 14 (rejecting the *Palko* formula as the basis for deciding what procedural protections are required of a State, in favor of a historical approach based on the Anglo-American legal tradition). Indeed, the passage cited in MR. JUSTICE WHITE's dissent as "most accurately reflect[ing] the thrust of prior decisions" on substantive due process, *post*, at 545, expressly points to history and tradition as the source for "supplying . . . content to this Constitutional concept." *Poe* v. *Ullman*, *supra*, at 542 (Harlan, J., dissenting).

[13] See generally Wilkinson & White, Constitutional Protection for Personal Lifestyles, 62 Cornell L. Rev. 563, 623–624 (1977).

[14] See generally B. Yorburg, The Changing Family (1973); Bronfenbrenner, The Calamitous Decline of the American Family, Washington

of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home. Decisions concerning child rearing, which *Yoder, Meyer, Pierce* and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household—indeed who may take on major responsibility for the rearing of the children.[15] Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life. This is apparently what happened here.[16]

Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree

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Post, Jan. 2, 1977, p. C1. Recent census reports bear out the importance of family patterns other than the prototypical nuclear family. In 1970, 26.5% of all families contained one or more members over 18 years of age, other than the head of household and spouse. U. S. Department of Commerce, 1970 Census of Population, vol. 1, pt. 1, Table 208. In 1960 the comparable figure was 26.1%. U. S. Department of Commerce, 1960 Census of Population, vol. 1, pt. 1, Table 187. Earlier data are not available.

[15] Cf. *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), which spoke broadly of family authority as against the State, in a case where the child was being reared by her aunt, not her natural parents.

[16] We are told that the mother of John Moore, Jr., died when he was less than one year old. He, like uncounted others who have suffered a similar tragedy, then came to live with the grandmother to provide the infant with a substitute for his mother's care and to establish a more normal home environment. Brief for Appellant 25.

of kinship to live together may not lightly be denied by the State. *Pierce* struck down an Oregon law requiring all children to attend the State's public schools, holding that the Constitution "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." 268 U. S., at 535. By the same token the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.

Reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring.

I join the plurality's opinion. I agree that the Constitution is not powerless to prevent East Cleveland from prosecuting as a criminal and jailing[1] a 63-year-old grandmother for refusing to expel from her home her now 10-year-old grandson who has lived with her and been brought up by her since his mother's death when he was less than a year old.[2] I do not question that a municipality may constitutionally zone to

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[1] This is a criminal prosecution which resulted in the grandmother's conviction and sentence to prison and a fine. Section 1345.99 permits imprisonment of up to six months, and a fine of up to $1,000, for violation of any provision of the Housing Code. Each day such violation continues may, by the terms of this section, constitute a separate offense.

[2] Brief for Appellant 4. In addition, we were informed by appellant's counsel at oral argument that

"application of this ordinance here would not only sever and disrupt the relationship between Mrs. Moore and her own son, but it would disrupt the relationship that is established between young John and young Dale, which is in essence a sibling type relationship, and it would most importantly disrupt the relationship between young John and his grandmother, which is the only maternal influence that he has had during his entire life." Tr. of Oral Arg. 16.

The city did not dispute these representations, and it is clear that this case was argued from the outset as requiring decision in this context.

alleviate noise and traffic congestion and to prevent overcrowded and unsafe living conditions, in short to enact reasonable land-use restrictions in furtherance of the legitimate objectives East Cleveland claims for its ordinance. But the zoning power is not a license for local communities to enact senseless and arbitrary restrictions which cut deeply into private areas of protected family life. East Cleveland may not constitutionally define "family" as essentially confined to parents and the parents' own children.[3] The plurality's opinion conclusively demonstrates that classifying family patterns in this eccentric way is not a rational means of achieving the ends East Cleveland claims for its ordinance, and further that the ordinance unconstitutionally abridges the "freedom of personal choice in matters of . . . family life [that] is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 639–640 (1974). I write only to underscore the cultural myopia of the arbitrary boundary drawn by the East Cleveland ordinance in the light of the tradition of the American home that has been a feature of our society since our beginning as a Nation—the "tradition" in the plurality's words, "of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children . . . ." *Ante*, at 504. The line drawn by this ordi-

[3] The East Cleveland ordinance defines "family" to include, in addition to the spouse of the "nominal head of the household," the couple's childless unmarried children, but only one dependent child (married or unmarried) having dependent children, and one parent of the nominal head of the household or of his or her spouse. Thus an "extended family" is authorized in only the most limited sense, and "family" is essentially confined to parents and their own children. Appellant grandmother was charged with violating the ordinance because John, Jr., lived with her at the same time her other grandson, Dale, Jr., was also living in the home; the latter is classified as an "unlicensed roomer" authorized by the ordinance to live in the house.

nance displays a depressing insensitivity toward the economic and emotional needs of a very large part of our society.

In today's America, the "nuclear family" is the pattern so often found in much of white suburbia. J. Vander Zanden, Sociology: A Systematic Approach 322 (3d ed. 1975). The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living. The "extended family" that provided generations of early Americans with social services and economic and emotional support in times of hardship, and was the beachhead for successive waves of immigrants who populated our cities,[4] remains not merely still a pervasive living pattern, but under the goad of brutal economic necessity, a prominent pattern—virtually a means of survival—for large numbers of the poor and deprived minorities of our society. For them compelled pooling of scant resources requires compelled sharing of a household.[5]

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[4] See Report of the National Advisory Commission on Civil Disorders 278–281 (1968); Kosa & Nash, Social Ascent of Catholics, 8 Social Order 98–103 (1958); M. Novak, The Rise of the Unmeltable Ethnics 209–210 (1972); B. Yorburg, The Changing Family 106–109 (1973); Kosa, Rachiele, & Schommer, Sharing the Home with Relatives, 22 Marriage and Family Living 129 (1960).

[5] See, *e. g.*, H. Gans, The Urban Villagers 45–73, 245–249 (1962).

"Perhaps the most important—or at least the most visible—difference between the classes is one of family structure. *The working class subculture* is distinguished by the dominant role of the family circle. . . .

"The specific characteristics of the family circle may differ widely—from the collateral peer group form of the West Enders, to the hierarchical type of the Irish, or to the classical three-generation extended family. . . . What matters most—and distinguishes this subculture from others—is that there be a family circle which is wider than the nuclear family, and that all of the opportunities, temptations, and pressures of the larger society be evaluated in terms of how they affect the ongoing way of life that has been built around this circle." *Id.*, at 244–245 (emphasis in original).

The "extended" form is especially familiar among black families.[6] We may suppose that this reflects the truism that black citizens, like generations of white immigrants before them, have been victims of economic and other disadvantages that would worsen if they were compelled to abandon extended, for nuclear, living patterns.[7] Even in husband and wife households, 13% of black families compared with 3% of white families include relatives under 18 years old, in addi-

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[6] Yorburg, *supra*, n. 4, at 108. "Within the black lower-class it has been quite common for several generations, or parts of the kin, to live together under one roof. Often a maternal grandmother is the acknowledged head of this type of household which has given rise to the term 'matrifocal' to describe lower-class black family patterns." See J. Scanzoni, The Black Family in Modern Society 134 (1971); see also Anderson, The Pains and Pleasures of Old Black Folks, Ebony 123, 128–130 (Mar. 1973). See generally E. Frazier, The Negro Family in the United States (1939); Lewis, The Changing Negro Family, in E. Ginzberg, ed., The Nation's Children 108 (1960).

The extended family often plays an important role in the rearing of young black children whose parents must work. Many such children frequently "spend all of their growing-up years in the care of extended kin. . . . Often children are 'given' to their grandparents, who rear them to adulthood. . . . Many children normally grow up in a three-generation household and they absorb the influences of grandmother and grandfather as well as mother and father." J. Ladner, Tomorrow's Tomorrow: The Black Woman 60 (1972).

[7] The extended family has many strengths not shared by the nuclear family.

"The case histories behind mounting rates of delinquency, addiction, crime, neurotic disabilities, mental illness, and senility in societies in which autonomous nuclear families prevail suggest that frequent failure to develop enduring family ties is a serious inadequacy for both individuals and societies." D. Blitsten, The World of the Family 256 (1963).

Extended families provide services and emotional support not always found in the nuclear family:

"The troubles of the nuclear family in industrial societies, generally, and in American society, particularly, stem largely from the inability of this type of family structure to provide certain of the services performed in the past by the extended family. Adequate health, education, and

tion to the couple's own children.[8] In black households whose head is an elderly woman, as in this case, the contrast is even more striking: 48% of such black households, compared with 10% of counterpart white households, include related minor children not offspring of the head of the household.[9]

I do not wish to be understood as implying that East Cleveland's enforcement of its ordinance is motivated by a racially discriminatory purpose: The record of this case would not support that implication. But the prominence of other than nuclear families among ethnic and racial minority groups, including our black citizens, surely demonstrates that the "extended family" pattern remains a vital tenet of our society.[10] It suffices that in prohibiting this pattern of family living as a means of achieving its objectives, appellee city has chosen a device that deeply intrudes into family associational rights that historically have been central, and today remain central, to a large proportion of our population.

Moreover, to sanction the drawing of the family line at the arbitrary boundary chosen by East Cleveland would surely conflict with prior decisions that protected "extended" family

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welfare provision, particularly for the two nonproductive generations in modern societies, the young and the old, is increasingly an insurmountable problem for the nuclear family. The unrelieved and sometimes unbearably intense parent-child relationship, where childrearing is not shared at least in part by others, and the loneliness of nuclear family units, increasingly turned in on themselves in contracted and relatively isolated settings, is another major problem." Yorburg, *supra*, n. 4, at 194.

[8] R. Hill, The Strengths of Black Families 5 (1972).

[9] *Id.*, at 5–6. It is estimated that at least 26% of black children live in other than husband-wife families, "including foster parents, the presence of other male or female relatives (grandfather or grandmother, older brother or sister, uncle or aunt), male or female nonrelatives, [or with] only *one* adult (usually mother) present . . . ." Scanzoni, *supra*, n. 6, at 44.

[10] Novak, *supra*, n. 4; Hill, *supra*, at 5–6; N. Glazer & D. Moynihan, Beyond the Melting Pot 50–53 (2d ed. 1970); L. Rainwater & W. Yancey, The Moynihan Report and the Politics of Controversy 51–60 (1967).

relationships. For the "private realm of family life which the state cannot enter," recognized as protected in *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944), was the relationship of aunt and niece. And in *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (1925), the protection held to have been unconstitutionally abridged was "the liberty of parents and *guardians* to direct the upbringing and education of children under their control" (emphasis added). See also *Wisconsin* v. *Yoder*, 406 U. S. 205, 232–233 (1972). Indeed, *Village of Belle Terre* v. *Boraas*, 416 U. S. 1 (1974), the case primarily relied upon by the appellee, actually supports the Court's decision. The Belle Terre ordinance barred only unrelated individuals from constituting a family in a single-family zone. The village took special care in its brief to emphasize that its ordinance did not in any manner inhibit the choice of *related* individuals to constitute a family, whether in the "nuclear" or "extended" form. This was because the village perceived that choice as one it was constitutionally powerless to inhibit. Its brief stated: "Whether it be the extended family of a more leisurely age or the nuclear family of today the role of the family in raising and training successive generations of the species makes it more important, we dare say, than any other social or legal institution . . . . *If any freedom not specifically mentioned in the Bill of Rights enjoys a 'preferred position' in the law it is most certainly the family.*" (Emphasis supplied.) Brief for Appellants in No. 73–191, O. T. 1973, p. 26. The cited decisions recognized, as the plurality recognizes today, that the choice of the "extended family" pattern is within the "freedom of personal choice in matters of . . . family life [that] is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." 414 U. S., at 639–640.

Any suggestion that the variance procedure of East Cleveland's Housing Code assumes special significance is without merit. This is not only because this grandmother

was not obligated to exhaust her administrative remedy before defending this prosecution on the ground that the single-family occupancy ordinance violates the Equal Protection Clause. *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926), the leading case in the zoning field, expressly held that one attacking the constitutionality of a building or zoning code need not first seek a variance. *Id.*, at 386. Rather, the matter of a variance is irrelevant also because the municipality is constitutionally powerless to abridge, as East Cleveland has done, the freedom of personal choice of related members of a family to live together. Thus, the existence of the variance procedure serves to lessen neither the irrationality of the definition of "family" nor the extent of its intrusion into family life-style decisions.

There is no basis for an inference—other than the city's self-serving statement that a hardship variance "possibly with some stipulation(s) would probably have been granted"—that this grandmother would have obtained a variance had she requested one. Indeed, a contrary inference is more supportable. In deciding to prosecute her in the first place, the city tipped its hand how discretion would have been exercised. In any event, § 1311.02 (1965), limits the discretion of the Board of Building Code Appeals to grant variances to those which are "in harmony with the general intent of such ordinance . . . ." If one of the legitimate objectives of the definition of "family" was to preserve the single (nuclear) family character of East Cleveland, then granting this grandmother a variance would be in excess of the Board's powers under the ordinance.

Furthermore, the very existence of the "escape hatch" of the variance procedure only heightens the irrationality of the restrictive definition, since application of the ordinance then depends upon which family units the zoning authorities permit to reside together and whom the prosecuting authorities choose to prosecute. The Court's disposition of the analogous situation in *Roe* v. *Wade*, 410 U. S. 113 (1973),

is instructive. There Texas argued that, despite a rigid and narrow statute prohibiting abortions except for the purpose of saving the mother's life, prosecuting authorities routinely tolerated elective abortion procedures in certain cases, such as nonconsensual pregnancies resulting from rape or incest. The Court was not persuaded that this saved the statute, THE CHIEF JUSTICE commenting that "no one in these circumstances should be placed in a posture of dependence on a prosecutorial policy or prosecutorial discretion." *Id.*, at 208 (concurring opinion). Similarly, this grandmother cannot be denied the opportunity to defend against this criminal prosecution because of a variance procedure that holds her family hostage to the vagaries of discretionary administrative decisions. *Smith* v. *Cahoon*, 283 U. S. 553, 562 (1931). We have now passed well beyond the day when illusory escape hatches could justify the imposition of burdens on fundamental rights. *Stanley* v. *Illinois*, 405 U. S. 645, 647–649 (1972); *Staub* v. *City of Baxley*, 355 U. S. 313, 319 (1958).

MR. JUSTICE STEVENS, concurring in the judgment.

In my judgment the critical question presented by this case is whether East Cleveland's housing ordinance is a permissible restriction on appellant's right to use her own property as she sees fit.

Long before the original States adopted the Constitution, the common law protected an owner's right to decide how best to use his own property. This basic right has always been limited by the law of nuisance which proscribes uses that impair the enjoyment of other property in the vicinity. But the question whether an individual owner's use could be further limited by a municipality's comprehensive zoning plan was not finally decided until this century.

The holding in *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, that a city could use its police power, not just to abate a specific use of property which proved offensive, but also to create and implement a comprehensive plan for the use

of land in the community, vastly diminished the rights of individual property owners. It did not, however, totally extinguish those rights. On the contrary, that case expressly recognized that the broad zoning power must be exercised within constitutional limits.

In his opinion for the Court, Mr. Justice Sutherland fused the two express constitutional restrictions on any state interference with private property—that property shall not be taken without due process nor for a public purpose without just compensation—into a single standard: "[B]efore [a zoning] ordinance can be declared unconstitutional, [it must be shown to be] clearly arbitrary and unreasonable, *having no substantial relation to the public health, safety, morals, or general welfare.*" *Id.*, at 395 (emphasis added). This principle was applied in *Nectow* v. *Cambridge*, 277 U. S. 183; on the basis of a specific finding made by the state trial court that "the health, safety, convenience and general welfare of the inhabitants of the part of the city affected" would not be promoted by prohibiting the landowner's contemplated use, this Court held that the zoning ordinance as applied was unconstitutional. *Id.*, at 188.[1]

With one minor exception,[2] between the *Nectow* decision in 1928 and the 1974 decision in *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, this Court did not review the substance of any zoning ordinances. The case-by-case development of the constitutional limits on the zoning power has not, therefore, taken place in this Court. On the other hand, during

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[1] The Court cited *Zahn* v. *Board of Public Works*, 274 U. S. 325. The statement of the rule in *Zahn* remains viable today:

"The most that can be said [of this zoning ordinance] is that whether that determination was an unreasonable, arbitrary or unequal exercise of power is fairly debatable. In such circumstances, the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." *Id.*, at 328.

[2] *Goldblatt* v. *Town of Hempstead*, 369 U. S. 590.

the past half century the broad formulations found in *Euclid* and *Nectow* have been applied in countless situations by the state courts. Those cases shed a revelatory light on the character of the single-family zoning ordinance challenged in this case.

Litigation involving single-family zoning ordinances is common. Although there appear to be almost endless differences in the language used in these ordinances,[3] they contain three principal types of restrictions. First, they define the kind of structure that may be erected on vacant land.[4] Second, they require that a single-family home be occupied only by a "single housekeeping unit."[5] Third, they often

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[3] See, for example, the various provisions quoted or paraphrased in *Brady* v. *Superior Court*, 200 Cal. App. 2d 69, 80–81, n. 3, 19 Cal. Rptr. 242, 249 n. 3 (1962).

[4] As this Court recognized in *Euclid*, even residential apartments can have a negative impact on an area of single-family homes.

"[O]ften the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by [a single-family dwelling area] . . . . [T]he coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities,—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances." 272 U. S., at 394–395.

[5] Limiting use to single-housekeeping units, like limitations on the number of occupants, protects the community's interest in minimizing overcrowding, avoiding the excessive use of municipal services, traffic control, and other aspects of an attractive physical environment. See *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, 9.

require that the housekeeping unit be made up of persons related by blood, adoption, or marriage, with certain limited exceptions.

Although the legitimacy of the first two types of restrictions is well settled,[6] attempts to limit occupancy to related persons have not been successful. The state courts have recognized a valid community interest in preserving the stable character of residential neighborhoods which justifies a prohibition against transient occupancy.[7] Nevertheless, in well-reasoned opinions, the courts of Illinois,[8] New York,[9] New Jersey,[10]

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[6] See nn. 4 and 5, *supra*, and also Professor N. Williams' discussion of the subject in his excellent treatise on zoning law, 2 American Land Planning Law 349–361 (1974).

[7] Types of group living which have not fared well under single-family ordinances include fraternities, *Schenectady* v. *Alumni Assn.*, 5 App. Div. 2d 14, 168 N. Y. S. 2d 754 (1957); sororities, *Cassidy* v. *Triebel*, 337 Ill. App. 117, 85 N. E. 2d 461 (1948); a retirement home designed for over 20 people, *Kellog* v. *Joint Council of Women's Auxiliaries Welfare Assn.*, 265 S. W. 2d 374 (Mo. 1954); and a commercial therapeutic home for emotionally disturbed children, *Browndale International* v. *Board of Adjustment*, 60 Wis. 2d 182, 208 N. W. 2d 121 (1973). These institutional uses are not only inconsistent with the single-housekeeping-unit concept but include many more people than would normally inhabit a single-family dwelling.

[8] In *City of Des Plaines* v. *Trottner*, 34 Ill. 2d 432, 216 N. E. 2d 116 (1966), the Illinois Supreme Court faced a challenge to a single-family zoning ordinance by a group of four unrelated young men who occupied a dwelling in violation of the ordinance which provided that a "'family' consists of one or more persons each related to the other by blood (or adoption or marriage) . . . ." *Id.*, at 433, 216 N. E. 2d, at 117. In his opinion for the court, Justice Schaefer wrote:

"When other courts have been called upon to define the term 'family' they have emphasized the single housekeeping unit aspect of the term, rather than the relationship of the occupants. [Citing cases.]

. . . . . .

"In terms of permissible zoning objectives, a group of persons bound together only by their common desire to operate a single housekeeping

[*Footnotes 9 and 10 are on page 517*]

California,[11] Connecticut,[12] Wisconsin,[13] and other jurisdictions,[14] have permitted unrelated persons to occupy single-family residences notwithstanding an ordinance prohibiting, either expressly or implicitly, such occupancy.

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unit, might be thought to have a transient quality that would affect adversely the stability of the neighborhood, and so depreciate the value of other property. An ordinance requiring relationship by blood, marriage or adoption could be regarded as tending to limit the intensity of land use. And it might be considered that a group of unrelated persons would be more likely to generate traffic and parking problems than would an equal number of related persons.

"But none of these observations reflects a universal truth. Family groups are mobile today, and not all family units are internally stable and well-disciplined. Family groups with two or more cars are not unfamiliar. And so far as intensity of use is concerned, the definition in the present ordinance, with its reference to the 'respective spouses' of persons related by blood, marriage or adoption, can hardly be regarded as an effective control upon the size of family units.

"The General Assembly has not specifically authorized the adoption of zoning ordinances that penetrate so deeply as this one does into the internal composition of a single housekeeping unit. Until it has done so, we are of the opinion that we should not read the general authority that it has delegated to extend so far." *Id.*, at 436–438, 216 N. E. 2d, at 119–120.

[9] In *White Plains* v. *Ferraioli*, 34 N. Y. 2d 300, 313 N. E. 2d 756 (1974), the Court of Appeals of New York refused to apply an ordinance limiting occupancy of single-family dwellings to related individuals to a "group home" licensed by the State to care for abandoned and neglected children. The court wrote:

"Zoning is intended to control types of housing and living and not the genetic or intimate internal family relations of human beings.

"Whether a family be organized along ties of blood or formal adoptions, or be a similarly structured group sponsored by the State, as is the group home, should not be consequential in meeting the test of the zoning ordinance. So long as the group home bears the generic character of a family unit as a relatively permanent household, and is not a framework for transients or transient living, it conforms to the purpose of the ordinance . . . ." *Id.*, at 305–306, 313 N. E. 2d, at 758.

[10] In *Kirsch Holding Co.* v. *Borough of Manasquan*, 59 N. J. 241, 252,

[*Footnote 11 is on page 518; footnotes 12, 13, and 14 are on page 519*]

These cases delineate the extent to which the state courts have allowed zoning ordinances to interfere with the right of a property owner to determine the internal composition of his

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281 A. 2d 513, 518 (1971), the Supreme Court of New Jersey reviewed a complex single-family zoning ordinance designed to meet what the court recognized to be a pressing community problem. The community, a seaside resort, had been inundated during recent summers by unruly groups of summer visitors renting seaside cottages. To solve the problems of excessive noise, overcrowding, intoxication, wild parties, and immorality that resulted from these group rentals, the community passed a zoning ordinance which prohibited seasonal rentals of cottages by most groups other than "families" related by blood or marriage. The court found that even though the problems were severe, the ordinance "preclude[d] so many harmless dwelling uses" that it became "sweepingly excessive, and therefore legally unreasonable." *Ibid.* The court quoted, *id.*, at 252, 281 A. 2d, at 519, the following language from *Gabe Collins Realty, Inc.* v. *Margate City*, 112 N. J. Super. 341, 349, 271 A. 2d 430, 434 (1970), in a similar case as "equally applicable here":

"Thus, even in the light of the legitimate concern of the municipality with the undesirable concomitants of group rentals experienced in Margate City, and of the presumption of validity of municipal ordinances, we are satisfied that the remedy here adopted constitutes a sweepingly excessive restriction of property rights as against the problem sought to be dealt with, and in legal contemplation deprives plaintiffs of their property without due process."

The court in *Kirsch Holding Co., supra*, at 251 n. 6, 281 A. 2d., at 518 n. 6, also quoted with approval the following statement from *Marino* v. *Mayor & Council of Norwood*, 77 N. J. Super. 587, 594, 187 A. 2d 217, 221 (1963):

"Until compelled to do so by a New Jersey precedent squarely in point, this court will not conclude that persons who have economic or other personal reasons for living together as a *bona fide* single housekeeping unit and who have no other orientation, commit a zoning violation, with possible penal consequences, just because they are not related."

[11] A California appellate court in *Brady* v. *Superior Court*, 200 Cal. App. 2d, at 81, 19 Cal. Rptr., at 250, allowed use of a single-family dwelling by two unrelated students, noting:

"The erection or construction of a 'single family dwelling,' in itself, would imply that any building so constructed would contain a central

household. The intrusion on that basic property right has not previously gone beyond the point where the ordinance defines a family to include only persons related by blood, marriage, or adoption. Indeed, as the cases in the margin demonstrate, state courts have not always allowed the intrusion to penetrate that far. The state decisions have upheld zoning ordinances which regulated the identity, as opposed to the number, of persons who may compose a household only to the extent that the ordinances require such households to remain nontransient, single-housekeeping units.[12]

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kitchen, dining room, living room, bedrooms; that is, constitute a single housekeeping unit. Consequently, to qualify as a 'single family dwelling' an erected structure need only be used as a single housekeeping unit."

[12] The Supreme Court of Connecticut allowed occupancy of a large summer home by four related families because the families did "not occupy separate quarters within the house, [but used] the lodging, cooking and eating facilities [as] common to all." *Neptune Park Assn.* v. *Steinberg*, 138 Conn. 357, 360, 84 A. 2d 687, 689 (1951).

[13] The Supreme Court of Wisconsin, noting that "the letter killeth but the spirit giveth life," 2 Corinthians 3:6, held that six priests and two lay brothers constituted a "family" and that their use, for purely residential purposes of a single-family dwelling did not violate a single-family zoning ordinance. *Missionaries of Our Lady of LaSalette* v. *Whitefish Bay*, 267 Wis. 609, 66 N. W. 2d 627 (1954).

[14] *Carroll* v. *Miami Beach*, 198 So. 2d 643 (Fla. App. 1967); *Robertson* v. *Western Baptist Hospital*, 267 S. W. 2d 395 (Ky. App. 1954); *Women's Kansas City St. Andrew Soc.* v. *Kansas City*, 58 F. 2d 593 (CA8 1932); *University Heights* v. *Cleveland Jewish Orphans' Home*, 20 F. 2d 743 (CA6 1927).

[15] *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, is consistent with this line of state authority. Chief Judge Breitel in *White Plains* v. *Ferraioli*, *supra*, at 304–305, 313 N. E. 2d, at 758, cogently characterized the *Belle Terre* decision upholding a single-family ordinance as one primarily concerned with the prevention of transiency in a small, quiet suburban community. He wrote:

"The group home [in *White Plains*] is not, for purposes of a zoning ordinance, a temporary living arrangement as would be a group of college students sharing a house and commuting to a nearby school (cf. *Village of*

There appears to be no precedent for an ordinance which excludes any of an owner's relatives from the group of persons who may occupy his residence on a permanent basis. Nor does there appear to be any justification for such a restriction on an owner's use of his property.[16] The city has failed totally to explain the need for a rule which would allow a homeowner to have two grandchildren live with her if they are brothers, but not if they are cousins. Since this ordinance has not been shown to have any "substantial relation to the public health, safety, morals, or general welfare" of the city of East Cleveland, and since it cuts so deeply into a fundamental right normally associated with the ownership of residential property—that of an owner to decide who may reside on his or her property—it must fall under the limited standard of review of zoning decisions which this Court preserved in

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Belle Terre v. *Boraas* . . .). Every year or so, different college students would come to take the place of those before them. There would be none of the permanency of community that characterizes a residential neighborhood of private homes."

[16] Of course, a community has other legitimate concerns in zoning an area for single-family use including prevention of overcrowding in residences and prevention of traffic congestion. A community which attacks these problems by restricting the composition of a household is using a means not reasonably related to the ends it seeks to achieve. See *Des Plaines* v. *Trottner*, 34 Ill. 2d, at 435–436, 216 N. E. 2d, at 118. To prevent overcrowding, a community can certainly place a limit on the number of occupants in a household, either in absolute terms or in relation to the available floor space. Indeed, the city of East Cleveland had on its books an ordinance requiring a minimum amount of floor space per occupant in every dwelling. See *Nolden* v. *East Cleveland City Comm'n*, 12 Ohio Misc. 205, 232 N. E. 2d 421 (Com. Pl. Ct., Cuyahoga Cty. 1966). Similarly, traffic congestion can be reduced by prohibiting on-street parking. To attack these problems through use of a restrictive definition of family is, as one court noted, like "burn[ing] the house to roast the pig." *Larson* v. *Mayor*, 99 N. J. Super. 365, 374, 240 A. 2d 31, 36 (1968). More narrowly, a limitation on *which* of the owner's grandchildren may reside with her obviously has no relevance to these problems.

Euclid and *Nectow*. Under that standard, East Cleveland's unprecedented ordinance constitutes a taking of property without due process and without just compensation.

For these reasons, I concur in the Court's judgment.

MR. CHIEF JUSTICE BURGER, dissenting.

It is unnecessary for me to reach the difficult constitutional issue this case presents. Appellant's deliberate refusal to use a plainly adequate administrative remedy provided by the city should foreclose her from pressing in this Court any constitutional objections to the city's zoning ordinance. Considerations of federalism and comity, as well as the finite capacity of federal courts, support this position. In courts, as in hospitals, two bodies cannot occupy the same space at the same time; when any case comes here which could have been disposed of long ago at the local level, it takes the place that might well have been given to some other case in which there was no alternative remedy.

(1)

The single-family zoning ordinances of the city of East Cleveland define the term "family" to include only the head of the household and his or her most intimate relatives, principally the spouse and unmarried and dependent children. Excluded from the definition of "family," and hence from cohabitation, are various persons related by blood or adoption to the head of the household. The obvious purpose of the city is the traditional one of preserving certain areas as family residential communities.

The city has established a Board of Building Code Appeals to consider variances from this facially stringent single-family limit when necessary to alleviate "practical difficulties and unnecessary hardships" and "to secure the general welfare and [do] substantial justice . . . ." East Cleveland Codified Ordinances § 1311.02 (1965). The Board has power to grant variances to "[a]ny person adversely affected by a decision of

any City official made in the enforcement of any [zoning] ordinance," so long as appeal is made to the Board within 10 days of notice of the decision appealed from. § 1311.03.

After appellant's receipt of the notice of violation, her lawyers made no effort to apply to the Board for a variance to exempt her from the restrictions of the ordinance, even though her situation appears on its face to present precisely the kind of "practical difficulties and unnecessary hardships" the variance procedure was intended to accommodate. Appellant's counsel does not claim appellant was unaware of the right to go to the Board and seek a variance, or that any attempt was made to secure relief by an application to the Board.[1] Indeed, appellant's counsel makes no claim that the failure to seek a variance was due to anything other than a deliberate decision to forgo the administrative process in favor of a judicial forum.

(2)

In view of appellant's deliberate bypass of the variance procedure, the question arises whether she should now be permitted to complain of the unconstitutionality of the single-family ordinance as it applies to her. This Court has not yet required one in appellant's position to utilize available state administrative remedies as a prerequisite to obtaining federal relief; but experience has demonstrated that such a requirement is imperative if the critical overburdening of federal courts at all levels is to be alleviated. That burden has now become "a crisis of overload, a crisis so serious that it threatens the capacity of the federal system to function as it should."

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[1] Counsel for appellant candidly admitted at oral argument that "Mrs. Moore did not seek a variance in this case" but argued that her failure to do so is constitutionally irrelevant. Tr. of Oral Arg. 20. Thus, this was not an unpublicized administrative remedy of which appellant remained unaware until after it became unavailable. Such a case would, of course, present materially different considerations. Cf. *Lambert* v. *California*, 355 U. S. 225 (1957).

Department of Justice Committee on Revision of the Federal Judicial System, Report on the Needs of the Federal Courts 1 (1977). The same committee went on to describe the disastrous effects an exploding caseload has had on the administration of justice:

> "Overloaded courts . . . mean long delays in obtaining a final decision and additional expense as court procedures become more complex in the effort to handle the rush of business. . . . [T]he quality of justice must necessarily suffer. Overloaded courts, seeking to deliver justice on time insofar as they can, necessarily begin to adjust their processes, sometimes in ways that threaten the integrity of the law and of the decisional process.
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> "District courts have delegated more and more of their tasks to magistrates . . . . Time for oral argument is steadily cut back . . . . [T]he practice of delivering written opinions is declining.
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> . . . . . .
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> ". . . Courts are forced to add more clerks, more administrative personnel, to move cases faster and faster. They are losing . . . time for reflection, time for the deliberate maturation of principles." *Id.*, at 3–4.

The devastating impact overcrowded dockets have on the quality of justice received by all litigants makes it essential that courts be reserved for the resolution of disputes for which no other adequate forum is available.

A

The basis of the doctrine of exhaustion of administrative remedies was simply put in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51 (1938), as

> "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or

> threatened injury until the prescribed administrative remedy has been exhausted."

Exhaustion is simply one aspect of allocation of overtaxed judicial resources. Appellant wishes to use a residential property in a manner at variance with a municipal housing code. That claim could have been swiftly and inexpensively adjudicated in a municipal administrative tribunal, without engaging cumbersome federal judicial machinery at the highest level. Of course, had appellant utilized the local administrative remedies and state judicial remedies to no avail, resort to this Court would have been available.[2]

The exhaustion principle asks simply that absent compelling circumstances—and none are claimed here—the avenues of relief nearest and simplest should be pursued first. This Court should now make unmistakably clear that when state or local governments provide administrative remedial procedures, no federal forum will be open unless the claimant can show either that the remedy is inadequate or that resort to those remedies is futile.

Utilization of available administrative processes is mandated for a complex of reasons. Statutes sometimes provide administrative procedures as the exclusive remedy. Even apart from a statutory command, it is common sense to permit the simple, speedy, and inexpensive processes of the administrative machinery to sift the facts and compile a complete record for the benefit of any reviewing courts. Exhaustion avoids interruption of the administrative process and allows application of an agency's specialized experience and the broad discretion granted to local entities, such as zoning boards.

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[2] Exhaustion does not deny or limit litigants' rights to a federal forum "because state administrative agency determinations do not create res judicata or collateral estoppel effects. The exhaustion of state administrative remedies postpones rather than precludes the assertion of federal jurisdiction." Comment, Exhaustion of State Administrative Remedies in Section 1983 Cases, 41 U. Chi. L. Rev. 537, 551 (1974).

Indeed, judicial review may be seriously hampered if the appropriate agency has no chance to apply its experience, exercise its discretion, or make a factual record reflecting all aspects of the problem.

Most important, if administrative remedies are pursued, the citizen may win complete relief without needlessly invoking judicial process. This permits the parties to resolve their disputes by relatively informal means far less costly and time consuming than litigation. By requiring exhaustion of administrative processes the courts are assured of reviewing only final agency decisions arrived at after considered judgment. It also permits agencies an opportunity to correct their own mistakes or give discretionary relief short of judicial review. Consistent failure by courts to mandate utilization of administrative remedies—under the growing insistence of lawyers demanding broad judicial remedies—inevitably undermines administrative effectiveness and defeats fundamental public policy by encouraging "end runs" around the administrative process.

It is apparent without discussion that resort to the local appeals board in this case would have furthered these policies, particularly since the exercise of informed discretion and experience by the proper agency is the essence of any housing code variance procedure. We ought not to encourage litigants to bypass simple, inexpensive, and expeditious remedies available at their doorstep in order to invoke expensive judicial machinery on matters capable of being resolved at local levels.

B

The suggestion is made that exhaustion of administrative remedies is not required on issues of constitutional law. In one sense this argument is correct, since administrative agencies have no power to decide questions of federal constitutional law. But no one has a right to a federal constitutional ad-

judication on an issue capable of being resolved on a less elevated plane. Indeed, few concepts have had more faithful adherence in this Court than the imperative of avoiding constitutional resolution of issues capable of being disposed of otherwise. Mr. Justice Brandeis put it well in a related context, arguing for judicial restraint in *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (concurring opinion):

> "[This] Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."

This Court has frequently remanded cases for exhaustion "before a challenge can be made in a reviewing court of the constitutionality of the basic statute, on which the agency may not pass . . . ." K. Davis, Administrative Law Text 394 (3d ed. 1972). Indeed, exhaustion is often required precisely *because* there are constitutional issues present in a case, in order to avoid unnecessary adjudication of these delicate questions by giving the affected administrative agency an opportunity to resolve the matter on nonconstitutional grounds. See *Christian* v. *New York Dept. of Labor*, 414 U. S. 614 (1974); *Public Utilities Comm'n of California* v. *United States*, 355 U. S. 534, 539–540 (1958); *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 553 (1954); *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 766–767 (1947); *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 309–311 (1937); Fuchs, Prerequisites to Judicial Review of Administrative Agency Action, 51 Ind. L. J. 817, 883 (1976).

Of course, if administrative authority fails to afford relief, further exhaustion is pointless and judicial relief may be available. See *Weinberger* v. *Salfi*, 422 U. S. 749 (1975).

But so long as favorable administrative action is still possible, the policies favoring exhaustion are not mitigated in the slightest by the presence of a constitutional issue. See *Christian, supra.* To the extent that a nonconstitutional decision is possible only at the administrative level, those policies are reinforced. Plainly we have here precisely such a case. Appearance before the local city Board would have provided an opportunity for complete relief without forcing a constitutional ruling. The posture of the constitutional issues in this case thus provides an additional reason supporting the exhaustion requirement.

C

It is also said that exhaustion is not required when to do so would inflict irreparable injury on the litigant. In the present case, as in others in which a constitutional claim is asserted, injury is likely to include the "loss or destruction of substantive rights." In such a case, "the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay . . . , has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention." *Aircraft & Diesel Equipment Corp., supra,* at 773.

But there is every reason to require resort to administrative remedies "where the individual charged is to be deprived of nothing until the completion of [the administrative] proceeding." *Gibson* v. *Berryhill,* 411 U. S. 564, 574–575 (1973); see *Natural Gas Co., supra,* at 309–311; *Schlesinger* v. *Councilman,* 420 U. S. 738 (1975); *Aircraft & Diesel Equipment Corp., supra,* at 773–774. The focus must be on the adequacy of the administrative remedy. If the desired relief may be obtained without undue burdens, and if substantial rights are protected as the process moves forward, no harm is done by requiring the litigant to pursue and exhaust those remedies before calling on the Constitution of

the United States. To do otherwise trivializes constitutional adjudication.[3]

In this case appellant need have surrendered no asserted constitutional rights in order to pursue the local administrative remedy. No reason appears why appellant could not have sought a variance as soon as notice of a claimed violation was received, without altering the living arrangements in question. The notice of violation gave appellant 10 days within which to seek a variance; no criminal or civil sanctions could possibly have attached pending the outcome of that proceeding.

Though timely invocation of the administrative remedy would have had no effect on appellant's asserted rights, and would have inflicted no irreparable injury, the present availability of such relief under the city ordinance is less clear. But it is unrealistic to expect a municipality to hold open its administrative process for years after legal enforcement action has begun. Appellant cannot rely on the current absence

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[3] This analysis explains those cases in which this Court has allowed persons subject to claimed unconstitutional restrictions on their freedom of expression to challenge that restriction without first applying for a permit which, if granted, would moot their claim. *E. g., Hynes* v. *Mayor of Oradell*, 425 U. S. 610 (1976); *Shuttlesworth* v. *Birmingham*, 394 U. S. 147 (1969); *Staub* v. *City of Baxley*, 355 U. S. 313 (1958). In each instance the permit procedure was itself an unconstitutional infringement on First Amendment rights. Thus, in those cases irreparable injury—the loss or postponement of precious First Amendment rights—was a concomitant of the available administrative procedure.

Similarly explicable are those cases in which challenge is made to the constitutionality of the administrative proceedings themselves. See *Freedman* v. *Maryland*, 380 U. S. 51 (1965); *Public Utilities Comm'n of California* v. *United States*, 355 U. S. 534, 540 (1958). But see *Christian* v. *New York Dept. of Labor*, 414 U. S. 614, 622 (1974), where appellants' constitutional due process challenge to administrative procedures was deferred pending agency action. Exhaustion in those situations would similarly risk infringement of a constitutional right by the administrative process itself.

of administrative relief either as justification for the original failure to seek it, or as a reason why accountability for that failure is unreasonable. See *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 611 n. 22 (1975). Any other rule would make a mockery of the exhaustion doctrine by placing no penalty on its violation.

D

This is not a case where inadequate or unclear or costly remedies make exhaustion inappropriate, or where the Board's position relating to appellant's claims is so fixed that further administrative review would be fruitless. There is not the slightest indication of any fixed Board policy against variances, or that a prompt application for a variance would not have been granted.[4] Nor is it dispositive that the case involves criminal rather than civil penalties. The applicability of the exhaustion principle to bar challenges to the legality of prosecutions is established, even where, unlike the present case, substantial felony penalties are at stake. *McGee* v. *United States*, 402 U. S. 479 (1971); *Yakus* v. *United States*, 321 U. S. 414 (1944); *Falbo* v. *United States*, 320 U. S. 549 (1944); see *McKart* v. *United States*, 395 U. S. 185 (1969). There is far less reason to take into account the criminal nature of the proceedings when only misdemeanor penalties are involved.

(3)

Thus, the traditional justifications offered in support of the exhaustion principle point toward application of the doctrine. But there is a powerful additional reason why exhaustion should be enforced in this case. We deal here with federal

[4] To be adequate for exhaustion purposes, an administrative remedy need not guarantee the litigant success on the merits in advance. What is required is a forum with the power to grant relief, capable of hearing the case with objectivity and dispatch. There is no reason to doubt that appellant would have received a fair hearing before the Board.

judicial review of an administrative determination by a subdivision of the State of Ohio. When the question before a federal court is whether to enforce exhaustion of state administrative remedies, interests of federalism and comity make the analysis strikingly similar to that appropriate when the question is whether federal courts should abstain from interference with ongoing state judicial proceedings.[5] In both situations federal courts are being requested to act in ways lacking deference to, and perhaps harmful to, important state interests in order to vindicate rights which can be protected in the state system as well as in the federal. Cf. *Wisconsin* v. *Constantineau*, 400 U. S. 433, 439 (1971) (BURGER, C. J., dissenting). The policies underlying this Court's refusals to jeopardize important state objectives needlessly in *Huffman* v. *Pursue, Ltd., supra; Juidice* v. *Vail*, 430 U. S. 327 (1977); and *Trainor* v. *Hernandez, ante*, p. 434, argue strongly against action which encourages evasion and undermining of other important state interests embodied in regulatory procedures.

When the State asserts its sovereignty through the administrative process, no less than when it proceeds judicially, "federal courts . . . should abide by standards of restraint that go well beyond those of private equity jurisprudence." *Huffman, supra*, at 603; cf. *Younger* v. *Harris*, 401 U. S. 37, 41 (1971). A proper respect for state integrity is manifested by and, in part, dependent on, our reluctance to disrupt state

[5] See *Parisi* v. *Davidson*, 405 U. S. 34, 37, 40 n. 6 (1972); *Public Utilities Comm'n* v. *United Fuel Co.*, 317 U. S. 456 (1943); *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 311 (1937); *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 229 (1908); *First Nat. Bank* v. *Board of County Comm'rs*, 264 U. S. 450 (1924); cf. *Schlesinger* v. *Councilman*, 420 U. S. 738, 756–757 (1975). See generally L. Jaffe, Judicial Control of Administrative Action 437–438 (1965); Fuchs, Prerequisites to Judicial Review of Administrative Agency Action, 51 Ind. L. J. 817, 861–862 (1976); Comment, Exhaustion of State Administrative Remedies Under the Civil Rights Act, 8 Ind. L. Rev. 565 (1975).

proceedings even when important federal rights are asserted as a reason for doing so. Where, as here, state law affords an appropriate "doorstep" vehicle for vindication of the claims underlying those rights, federal courts should not be called upon unless those remedies have been utilized. No litigant has a right to force a constitutional adjudication by eschewing the only forum in which adequate nonconstitutional relief is possible. Appellant seeks to invoke federal judicial relief. We should now make clear that the finite resources of this Court are not available unless the litigant has first pursued all adequate and available administrative remedies.

The doctrine of exhaustion of administrative remedies has a long history. Though its salutary effects are undisputed, they have often been casually neglected, due to the judicial penchant of honoring the doctrine more in the breach than in the observance. For my part, the time has come to insist on enforcement of the doctrine whenever the local or state remedy is adequate and where asserted rights can be protected and irreparable injury avoided within the administrative process. Only by so doing will this Court and other federal courts be available to deal with the myriad new problems clamoring for resolution.

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST joins, dissenting.

In *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, the Court considered a New York village ordinance that restricted land use within the village to single-family dwellings. That ordinance defined "family" to include all persons related by blood, adoption, or marriage who lived and cooked together as a single-housekeeping unit; it forbade occupancy by any group of three or more persons who were not so related. We held that the ordinance was a valid effort by the village government to promote the general community welfare, and that it did not violate the Fourteenth Amendment or in-

fringe any other rights or freedoms protected by the Constitution.

The present case brings before us a similar ordinance of East Cleveland, Ohio, one that also limits the occupancy of any dwelling unit to a single family, but that defines "family" to include only certain combinations of blood relatives. The question presented, as I view it, is whether the decision in *Belle Terre* is controlling, or whether the Constitution compels a different result because East Cleveland's definition of "family" is more restrictive than that before us in the *Belle Terre* case.

The city of East Cleveland is a residential suburb of Cleveland, Ohio. It has enacted a comprehensive Housing Code, one section of which prescribes that "[t]he occupancy of any dwelling unit shall be limited to one, and only one, family . . . ."[1] The Code defines the term "family" as follows:

> " 'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:
>
> "(a) Husband or wife of the nominal head of the household.
>
> "(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.
>
> "(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.
>
> "(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of

[1] East Cleveland Housing Code § 1351.02 (1964).

the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

"(e) A family may consist of one individual." [2]

The appellant, Inez Moore, owns a 2½-story frame house in East Cleveland. The building contains two "dwelling units." [3] At the time this litigation began Mrs. Moore occupied one of these dwelling units with her two sons, John Moore, Sr., and Dale Moore, Sr., and their two sons, John, Jr., and Dale, Jr.[4] These five persons constituted more than one family under the ordinance.

In January 1973, a city housing inspector cited Mrs. Moore for occupation of the premises by more than one family.[5] She received a notice of violation directing her to

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[2] East Cleveland Housing Code § 1341.08 (1966).

[3] The Housing Code defines a "dwelling unit" as "a group of rooms arranged, maintained or designed to be occupied by a single family and consisting of a complete bathroom with toilet, lavatory and tub or shower facilities; one, and one only, complete kitchen or kitchenette with approved cooking, refrigeration and sink facilities; approved living and sleeping facilities. All of such facilities shall be in contiguous rooms and used exclusively by such family and by any authorized persons occupying such dwelling unit with the family." § 1341.07.

[4] There is some suggestion in the record that the other dwelling unit in the appellant's house was also occupied by relatives of Mrs. Moore. A notice of violation dated January 16, 1973, refers to "Ms. Carol Moore and her son, Derik," as illegal occupants in the other unit, and at some point the illegal occupancy in one of the units allegedly was corrected by transferring one occupant over to the other unit.

[5] Mrs. Moore, as the owner of the house, was responsible for compliance with the Housing Code. East Cleveland Housing Code § 1343.04 (1966). The illegal occupant, however, was identified by the city as John Moore, Jr., Mrs. Moore's grandson. The record suggests no reason why he was named, rather than Dale Moore, Jr. The occupancy might have been

correct the situation, which she did not do. Sixteen months passed, during which the city repeatedly complained about the violation. Mrs. Moore did not request relief from the Board of Building Code Appeals, although the Code gives the Board the explicit power to grant a variance "where practical difficulties and unnecessary hardships shall result from the strict compliance with or the enforcement of the provisions of any ordinance . . . ." [6] Finally, in May 1974, a municipal court found Mrs. Moore guilty of violating the single-family occupancy ordinance. The court overruled her motion to dismiss the charge, rejecting her claim that the ordinance's definition of "family" is invalid on its face under the United States Constitution. The Ohio Court of Appeals affirmed on the authority of *Village of Belle Terre* v. *Boraas*, and the Ohio Supreme Court dismissed Mrs. Moore's appeal.

In my view, the appellant's claim that the ordinance in question invades constitutionally protected rights of association and privacy is in large part answered by the *Belle Terre* decision. The argument was made there that a municipality could not zone its land exclusively for single-family occupancy because to do so would interfere with protected rights of privacy or association. We rejected this contention, and held that the ordinance at issue "involve[d] no 'fundamental' right guaranteed by the Constitution, such as . . . the right of association, *NAACP* v. *Alabama*, 357 U. S. 449; . . . or any rights of privacy, cf. *Griswold* v. *Connecticut*, 381 U. S. 479; *Eisenstadt* v. *Baird*, 405 U. S. 438, 453–454." 416 U. S., at 7–8.

The *Belle Terre* decision thus disposes of the appellant's contentions to the extent they focus not on her blood relationships with her sons and grandsons but on more general

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legal but for one of the two grandsons. One of Mrs. Moore's sons, together with his son, could have lived with Mrs. Moore under § 1341.08 (d) of the Code if they were dependent on her. The other son, provided he was "unmarried," could have been included under § 1341.08 (b).

[6] East Cleveland Building Code § 1311.02 (1965).

notions about the "privacy of the home." Her suggestion that every person has a constitutional right permanently to share his residence with whomever he pleases, and that such choices are "beyond the province of legitimate governmental intrusion," amounts to the same argument that was made and found unpersuasive in *Belle Terre*.

To be sure, the ordinance involved in *Belle Terre* did not prevent blood relatives from occupying the same dwelling, and the Court's decision in that case does not, therefore, foreclose the appellant's arguments based specifically on the ties of kinship present in this case. Nonetheless, I would hold, for the reasons that follow, that the existence of those ties does not elevate either the appellant's claim of associational freedom or her claim of privacy to a level invoking constitutional protection.

To suggest that the biological fact of common ancestry necessarily gives related persons constitutional rights of association superior to those of unrelated persons is to misunderstand the nature of the associational freedoms that the Constitution has been understood to protect. Freedom of association has been constitutionally recognized because it is often indispensable to effectuation of explicit First Amendment guarantees. See *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 460–461; *Bates* v. *Little Rock*, 361 U. S. 516, 523; *Shelton* v. *Tucker*, 364 U. S. 479; *NAACP* v. *Button*, 371 U. S. 415, 430–431; *Railroad Trainmen* v. *Virginia Bar*, 377 U. S. 1; *Kusper* v. *Pontikes*, 414 U. S. 51, 56–61; cf. *Edwards* v. *South Carolina*, 372 U. S. 229. But the scope of the associational right, until now, at least, has been limited to the constitutional need that created it; obviously not every "association" is for First Amendment purposes or serves to promote the ideological freedom that the First Amendment was designed to protect.

The "association" in this case is not for any purpose relating to the promotion of speech, assembly, the press, or religion. And wherever the outer boundaries of constitutional protec-

tion of freedom of association may eventually turn out to be, they surely do not extend to those who assert no interest other than the gratification, convenience, and economy of sharing the same residence.

The appellant is considerably closer to the constitutional mark in asserting that the East Cleveland ordinance intrudes upon "the private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, 321 U. S. 158, 166. Several decisions of the Court have identified specific aspects of what might broadly be termed "private family life" that are constitutionally protected against state interference. See, *e. g.*, *Roe* v. *Wade*, 410 U. S. 113, 152–154 (woman's right to decide whether to terminate pregnancy); *Loving* v. *Virginia*, 388 U. S. 1, 12 (freedom to marry person of another race); *Griswold* v. *Connecticut*, 381 U. S. 479; *Eisenstadt* v. *Baird*, 405 U. S. 438 (right to use contraceptives); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (parents' right to send children to private schools); *Meyer* v. *Nebraska*, 262 U. S. 390 (parents' right to have children instructed in foreign language).

Although the appellant's desire to share a single-dwelling unit also involves "private family life" in a sense, that desire can hardly be equated with any of the interests protected in the cases just cited. The ordinance about which the appellant complains did not impede her choice to have or not to have children, and it did not dictate to her how her own children were to be nurtured and reared. The ordinance clearly does not prevent parents from living together or living with their unemancipated offspring.

But even though the Court's previous cases are not directly in point, the appellant contends that the importance of the "extended family" in American society requires us to hold that her decision to share her residence with her grandsons may not be interfered with by the State. This decision, like the decisions involved in bearing and raising children, is said

to be an aspect of "family life" also entitled to substantive protection under the Constitution. Without pausing to inquire how far under this argument an "extended family" might extend, I cannot agree.[7] When the Court has found that the Fourteenth Amendment placed a substantive limitation on a State's power to regulate, it has been in those rare cases in which the personal interests at issue have been deemed " 'implicit in the concept of ordered liberty.' " See *Roe* v. *Wade, supra,* at 152, quoting *Palko* v. *Connecticut,* 302 U. S. 319, 325. The interest that the appellant may have in permanently sharing a single kitchen and a suite of contiguous rooms with some of her relatives simply does not rise to that level. To equate this interest with the fundamental decisions to marry and to bear and raise children is to extend the limited substantive contours of the Due Process Clause beyond recognition.

The appellant also challenges the single-family occupancy ordinance on equal protection grounds. Her claim is that the city has drawn an arbitrary and irrational distinction between groups of people who may live together as a "family" and those who may not. While acknowledging the city's right to preclude more than one family from occupying a single-dwelling unit, the appellant argues that the purposes of the single-family occupancy law would be equally served by an ordinance that did not prevent her from sharing her residence with her two sons and their sons.

This argument misconceives the nature of the constitutional inquiry. In a case such as this one, where the challenged

[7] The opinion of MR. JUSTICE POWELL and MR. JUSTICE BRENNAN'S concurring opinion both emphasize the traditional importance of the extended family in American life. But I fail to understand why it follows that the residents of East Cleveland are constitutionally prevented from following what MR. JUSTICE BRENNAN calls the "pattern" of "white suburbia," even though that choice may reflect "cultural myopia." In point of fact, East Cleveland is a predominantly Negro community, with a Negro City Manager and City Commission.

ordinance intrudes upon no substantively protected constitutional right, it is not the Court's business to decide whether its application in a particular case seems inequitable, or even absurd. The question is not whether some other ordinance, drafted more broadly, might have served the city's ends as well or almost as well. The task, rather, is to determine if East Cleveland's ordinance violates the Equal Protection Clause of the United States Constitution. And in performing that task, it must be borne in mind that "[w]e deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be '"reasonable, not arbitrary"' (quoting *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415) and bears 'a rational relationship to a [permissible] state objective.' *Reed* v. *Reed*, 404 U. S. 71, 76." *Village of Belle Terre* v. *Boraas*, 416 U. S., at 8. "[E]very line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function." *Ibid.* (footnote omitted).[8]

Viewed in the light of these principles, I do not think East Cleveland's definition of "family" offends the Constitution. The city has undisputed power to ordain single-family residen-

[8] The observation of Mr. Justice Holmes quoted in the *Belle Terre* opinion, 416 U. S., at 8 n. 5, bears repeating here.

"When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 41 (dissenting opinion).

tial occupancy. *Village of Belle Terre* v. *Boraas, supra; Euclid* v. *Ambler Realty Co.*, 272 U. S. 365. And that power plainly carries with it the power to say what a "family" is. Here the city has defined "family" to include not only father, mother, and dependent children, but several other close relatives as well. The definition is rationally designed to carry out the legitimate governmental purposes identified in the *Belle Terre* opinion: "The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." 416 U. S., at 9.[9]

Obviously, East Cleveland might have as easily and perhaps as effectively hit upon a different definition of "family." But a line could hardly be drawn that would not sooner or later become the target of a challenge like the appellant's. If "family" included all of the householder's grandchildren there would doubtless be the hard case of an orphaned niece or nephew. If, as the appellant suggests, a "family" must include all blood relatives, what of longtime friends? The point is that any definition would produce hardships in some cases without materially advancing the legislative purpose. That this ordinance also does so is no reason to hold it unconstitutional, unless we are to use our power to interpret the United States Constitution as a sort of generalized authority to correct seeming inequity wherever it surfaces. It is not for us to rewrite the ordinance, or substitute our judgment for

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[9] The appellant makes much of East Cleveland Housing Code § 1351.03 (1966), which prescribes a minimum habitable floor area per person; she argues that because the municipality has chosen to establish a specific density control the single-family ordinance can have no role to play. It is obvious, however, that § 1351.03 is directed not at preserving the character of a residential area but at establishing minimum health and safety standards.

the discretion of the prosecutor who elected to initiate this litigation.[10]

In this connection the variance provisions of East Cleveland's Building Code assume special significance, for they show that the city recognized the difficult problems its ordinances were bound to create in particular cases, and provided a means to solve at least some of them. Section 1311.01 of the Code establishes a Board of Building Code Appeals. Section 1311.02 then provides, in pertinent part:

> "The Board of Building Code Appeals shall determine all matters properly presented to it and where practical difficulties and unnecessary hardships shall result from the strict compliance with or the enforcement of the provisions of any ordinance for which it is designated as

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[10] MR. JUSTICE STEVENS, in his opinion concurring in the judgment, frames the issue in terms of the "appellant's right to use her own property as she sees fit." *Ante*, at 513. Focusing on the householder's property rights does not substantially change the constitutional analysis. If the ordinance is invalid under the Equal Protection Clause as to those classes of people whose occupancy it forbids, I should suppose it is also invalid as an arbitrary intrusion upon the property owner's rights to have them live with her. On the other hand, if the ordinance is a rational attempt to promote "the city's interest in preserving the character of its neighborhoods," *Young* v. *American Mini Theatres*, 427 U. S. 50, 71 (opinion of STEVENS, J.), it is consistent with the Equal Protection Clause and a permissible restriction on the use of private property under *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, and *Nectow* v. *Cambridge*, 277 U. S. 183.

The state cases that MR. JUSTICE STEVENS discusses do not answer this federal constitutional issue. For the most part, they deal with state-law issues concerning the proper statutory construction of the term "family," and they indicate only that state courts have been reluctant to extend ambiguous single-family zoning ordinances to nontransient, single-housekeeping units. By no means do they establish that narrow definitions of the term "family" are unconstitutional.

Finally, MR. JUSTICE STEVENS calls the city to task for failing "to explain the need" for enacting this particular ordinance. *Ante*, at 520. This places the burden on the wrong party.

> the Board of Appeals, such Board shall have the power to grant variances in harmony with the general intent of such ordinance and to secure the general welfare and substantial justice in the promotion of the public health, comfort, convenience, morals, safety and general welfare of the City."

The appellant did not request a variance under this section, although she could have done so. While it is impossible to know whether such a request would have been granted, her situation appears to present precisely the kind of "practical difficulties" and "unnecessary hardships" that the variance provisions were designed to accommodate.

This is not to say that the appellant was obligated to exhaust her administrative remedy before defending this prosecution on the ground that the single-family occupancy ordinance violates the Equal Protection Clause. In assessing her claim that the ordinance is "arbitrary" and "irrational," however, I think the existence of the variance provisions is particularly persuasive evidence to the contrary. The variance procedure, a traditional part of American land-use law, bends the straight lines of East Cleveland's ordinances, shaping their contours to respond more flexibly to the hard cases that are the inevitable byproduct of legislative linedrawing.

For these reasons, I think the Ohio courts did not err in rejecting the appellant's constitutional claims. Accordingly, I respectfully dissent.

MR. JUSTICE WHITE, dissenting.

The Fourteenth Amendment forbids any State to "deprive any person of life, liberty, or property, without due process of law," or to "deny to any person within its jurisdiction the equal protection of the laws." Both provisions are invoked in this case in an attempt to invalidate a city zoning ordinance.

I

The emphasis of the Due Process Clause is on "process." As Mr. Justice Harlan once observed, it has been "ably and insistently argued in response to what were felt to be abuses by this Court of its reviewing power," that the Due Process Clause should be limited "to a guarantee of procedural fairness." *Poe* v. *Ullman*, 367 U. S. 497, 540 (1961) (dissenting opinion). These arguments had seemed "persuasive" to Justices Brandeis and Holmes, *Whitney* v. *California*, 274 U. S. 357, 373 (1927), but they recognized that the Due Process Clause, by virtue of case-to-case "judicial inclusion and exclusion," *Davidson* v. *New Orleans*, 96 U. S. 97, 104 (1878), had been construed to proscribe matters of substance, as well as inadequate procedures, and to protect from invasion by the States "all fundamental rights comprised within the term liberty." *Whitney* v. *California*, *supra*, at 373.

Mr. Justice Black also recognized that the Fourteenth Amendment had substantive as well as procedural content. But believing that its reach should not extend beyond the specific provisions of the Bill of Rights, see *Adamson* v. *California*, 332 U. S. 46, 68 (1947) (dissenting opinion), he never embraced the idea that the Due Process Clause empowered the courts to strike down merely unreasonable or arbitrary legislation, nor did he accept Mr. Justice Harlan's consistent view. See *Griswold* v. *Connecticut*, 381 U. S. 479, 507 (1965) (Black, J., dissenting), and *id.*, at 499 (Harlan, J., concurring in judgment). Writing at length in dissent in *Poe* v. *Ullman*, *supra*, at 543, Mr. Justice Harlan stated the essence of his position as follows:

> "This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and sei-

> zures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, see *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Holden* v. *Hardy*, 169 U. S. 366; *Booth* v. *Illinois*, 184 U. S. 425; *Nebbia* v. *New York*, 291 U. S. 502; *Skinner* v. *Oklahoma*, 316 U. S. 535, 544 (concurring opinion); *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. Cf. *Skinner* v. *Oklahoma, supra; Bolling* v. *Sharpe*, [347 U. S. 497 (1954)]."

This construction was far too open ended for Mr. Justice Black. For him, *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), and *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), as substantive due process cases, were as suspect as *Lochner* v. *New York*, 198 U. S. 45 (1905), *Coppage* v. *Kansas*, 236 U. S. 1 (1915), and *Adkins* v. *Children's Hospital*, 261 U. S. 525 (1923). In his view, *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963), should have finally disposed of them all. But neither *Meyer* nor *Pierce* has been overruled, and recently there have been decisions of the same genre—*Roe* v. *Wade*, 410 U. S. 113 (1973); *Loving* v. *Virginia*, 388 U. S. 1 (1967); *Griswold* v. *Connecticut, supra;* and *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972). Not all of these decisions purport to rest on substantive due process grounds, compare *Roe* v. *Wade, supra*, at 152–153, with *Eisenstadt* v. *Baird, supra*, at 453–454, but all represented substantial reinterpretations of the Constitution.

Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of

the Fifth and Fourteenth Amendments. This is not to suggest, at this point, that any of these cases should be overruled, or that the process by which they were decided was illegitimate or even unacceptable, but only to underline Mr. Justice Black's constant reminder to his colleagues that the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable. And no one was more sensitive than Mr. Justice Harlan to any suggestion that his approach to the Due Process Clause would lead to judges "roaming at large in the constitutional field." *Griswold* v. *Connecticut, supra,* at 502. No one proceeded with more caution than he did when the validity of state or federal legislation was challenged in the name of the Due Process Clause.

This is surely the preferred approach. That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, and that much of the underpinning for the broad, substantive application of the Clause disappeared in the conflict between the Executive and the Judiciary in the 1930's and 1940's, the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.

II

Accepting the cases as they are and the Due Process Clause as construed by them, however, I think it evident that the

threshold question in any due process attack on legislation, whether the challenge is procedural or substantive, is whether there is a deprivation of life, liberty, or property. With respect to "liberty," the statement of Mr. Justice Harlan in *Poe* v. *Ullman*, quoted *supra*, at 504, most accurately reflects the thrust of prior decisions—that the Due Process Clause is triggered by a variety of interests, some much more important than others. These interests have included a wide range of freedoms in the purely commercial area such as the freedom to contract and the right to set one's own prices and wages. *Meyer* v. *Nebraska*, *supra*, at 399, took a characteristically broad view of "liberty":

> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

As I have said, *Meyer* has not been overruled nor its definition of liberty rejected. The results reached in some of the cases cited by *Meyer* have been discarded or undermined by later cases, but those cases did not cut back the definition of liberty espoused by earlier decisions. They disagreed only, but sharply, as to the protection that was "due" the particular liberty interests involved. See, for example, *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937), overruling *Adkins* v. *Children's Hospital*, 261 U. S. 525 (1923).

Just a few years ago, we recognized that while "the range of interests protected by procedural due process is not in-

finite," and while we must look to the nature of the interest rather than its weight in determining whether a protected interest is at issue, the term "liberty" has been given broad meaning in our cases. *Board of Regents* v. *Roth*, 408 U. S. 564, 570–571 (1972). "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed. See, *e. g.*, *Bolling* v. *Sharpe*, 347 U. S. 497, 499–500; *Stanley* v. *Illinois*, 405 U. S. 645." *Id.*, at 572.

It would not be consistent with prior cases to restrict the liberties protected by the Due Process Clause to those fundamental interests "implicit in the concept of ordered liberty." *Ante*, at 537. *Palko* v. *Connecticut*, 302 U. S. 319 (1937), from which this much-quoted phrase is taken, *id.*, at 325, is not to the contrary. *Palko* was a criminal case, and the issue was thus not whether a protected liberty interest was at stake but what protective process was "due" that interest. The Court used the quoted standard to determine which of the protections of the Bill of Rights was due a criminal defendant in a state court within the meaning of the Fourteenth Amendment. Nor do I think the broader view of "liberty" is inconsistent with or foreclosed by the dicta in *Roe* v. *Wade*, 410 U. S., at 152, and *Paul* v. *Davis*, 424 U. S. 693, 713 (1976). These cases at most assert that only fundamental liberties will be given *substantive* protection; and they may be understood as merely identifying certain fundamental interests that the Court has deemed deserving of a heightened degree of protection under the Due Process Clause.

It seems to me that Mr. Justice Douglas was closest to the mark in *Poe* v. *Ullman*, 367 U. S., at 517, when he said that the trouble with the holdings of the "old Court" was not in its definition of liberty but in its definition of the protections guaranteed to that liberty—"not in entertaining inquiries concerning the constitutionality of social legislation but in applying the standards that it did."

The term "liberty" is not, therefore, to be given a crabbed construction. I have no more difficulty than MR. JUSTICE POWELL apparently does in concluding that appellant in this case properly asserts a liberty interest within the meaning of the Due Process Clause. The question is not one of liberty *vel non*. Rather, there being no procedural issue at stake, the issue is whether the precise interest involved—the interest in having more than one set of grandchildren live in her home—is entitled to such substantive protection under the Due Process Clause that this ordinance must be held invalid.

III

Looking at the doctrine of "substantive" due process as having to do with the possible invalidity of an official rule of conduct rather than of the procedures for enforcing that rule, I see the doctrine as taking several forms under the cases, each differing in the severity of review and the degree of protection offered to the individual. First, a court may merely assure itself that there is in fact a duly enacted law which proscribes the conduct sought to be prevented or sanctioned. In criminal cases, this approach is exemplified by the refusal of courts to enforce vague statutes that no reasonable person could understand as forbidding the challenged conduct. There is no such problem here.

Second is the general principle that "liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect." *Meyer* v. *Nebraska*, 262 U. S., at 399–400. This means-end test appears to require that any statute restrictive of liberty have an ascertainable purpose and represent a rational means to achieve that purpose, whatever the nature of the liberty interest involved. This approach was part of the substantive due process doctrine

prevalent earlier in the century, and it made serious inroads on the presumption of constitutionality supposedly accorded to state and federal legislation. But with *Nebbia* v. *New York*, 291 U. S. 502 (1934), and other cases of the 1930's and 1940's such as *West Coast Hotel Co.* v. *Parrish*, *supra*, the courts came to demand far less from and to accord far more deference to legislative judgments. This was particularly true with respect to legislation seeking to control or regulate the economic life of the State or Nation. Even so, "while the legislative judgment on economic and business matters is 'well-nigh conclusive' . . . , it is not beyond judicial inquiry." *Poe* v. *Ullman*, *supra*, at 518 (Douglas, J., dissenting). No case that I know of, including *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963), has announced that there is some legislation with respect to which there no longer exists a means-ends test as a matter of substantive due process law. This is not surprising, for otherwise a protected liberty could be infringed by a law having no purpose or utility whatsoever. Of course, the current approach is to deal more gingerly with a state statute and to insist that the challenger bear the burden of demonstrating its unconstitutionality; and there is a broad category of cases in which substantive review is indeed mild and very similar to the original thought of *Munn* v. *Illinois*, 94 U. S. 113, 132 (1877), that "if a state of facts could exist that would justify such legislation," it passes its initial test.

There are various "liberties," however, which require that infringing legislation be given closer judicial scrutiny, not only with respect to existence of a purpose and the means employed, but also with respect to the importance of the purpose itself relative to the invaded interest. Some interests would appear almost impregnable to invasion, such as the freedoms of speech, press, and religion, and the freedom from cruel and unusual punishments. Other interests, for example, the right of association, the right to vote, and various

claims sometimes referred to under the general rubric of the right to privacy, also weigh very heavily against state claims of authority to regulate. It is this category of interests which, as I understand it, MR. JUSTICE STEWART refers to as "'implicit in the concept of ordered liberty.'" *Ante*, at 537. Because he would confine the reach of substantive due process protection to interests such as these and because he would not classify in this category the asserted right to share a house with the relatives involved here, he rejects the due process claim.

Given his premise, he is surely correct. Under our cases, the Due Process Clause extends substantial protection to various phases of family life, but none requires that the claim made here be sustained. I cannot believe that the interest in residing with more than one set of grandchildren is one that calls for any kind of heightened protection under the Due Process Clause. To say that one has a personal right to live with all, rather than some, of one's grandchildren and that this right is implicit in ordered liberty is, as my Brother STEWART says, "to extend the limited substantive contours of the Due Process Clause beyond recognition." *Ibid.* The present claim is hardly one of which it could be said that "neither liberty nor justice would exist if [it] were sacrificed." *Palko* v. *Connecticut*, 302 U. S., at 326.

MR. JUSTICE POWELL would apparently construe the Due Process Clause to protect from all but quite important state regulatory interests any right or privilege that in his estimate is deeply rooted in the country's traditions. For me, this suggests a far too expansive charter for this Court and a far less meaningful and less confining guiding principle than MR. JUSTICE STEWART would use for serious substantive due process review. What the deeply rooted traditions of the country are is arguable; which of them deserve the protection of the Due Process Clause is even more debatable. The suggested view would broaden enormously the horizons of

the Clause; and, if the interest involved here is any measure of what the States would be forbidden to regulate, the courts would be substantively weighing and very likely invalidating a wide range of measures that Congress and state legislatures think appropriate to respond to a changing economic and social order.

Mrs. Moore's interest in having the offspring of more than one dependent son live with her qualifies as a liberty protected by the Due Process Clause; but, because of the nature of that particular interest, the demands of the Clause are satisfied once the Court is assured that the challenged proscription is the product of a duly enacted or promulgated statute, ordinance, or regulation and that it is not wholly lacking in purpose or utility. That under this ordinance any number of unmarried children may reside with their mother and that this number might be as destructive of neighborhood values as one or more additional grandchildren is just another argument that children and grandchildren may not constitutionally be distinguished by a local zoning ordinance.

That argument remains unpersuasive to me. Here the head of the household may house himself or herself and spouse, their parents, and any number of their unmarried children. A fourth generation may be represented by only one set of grandchildren and then only if born to a dependent child. The ordinance challenged by appellant prevents her from living with both sets of grandchildren only in East Cleveland, an area with a radius of three miles and a population of 40,000. Brief for Appellee 16 n. 1. The ordinance thus denies appellant the opportunity to live with all her grandchildren in this particular suburb; she is free to do so in other parts of the Cleveland metropolitan area. If there is power to maintain the character of a single-family neighborhood, as there surely is, some limit must be placed on the reach of the "family." Had it been our task to legislate, we

might have approached the problem in a different manner than did the drafters of this ordinance; but I have no trouble in concluding that the normal goals of zoning regulation are present here and that the ordinance serves these goals by limiting, in identifiable circumstances, the number of people who can occupy a single household. The ordinance does not violate the Due Process Clause.

IV

For very similar reasons, the equal protection claim must fail, since it is not to be judged by the strict scrutiny standard employed when a fundamental interest or suspect classification is involved, see, *e. g.*, *Dunn* v. *Blumstein*, 405 U. S. 330 (1972), and *Korematsu* v. *United States*, 323 U. S. 214 (1944), or by the somewhat less strict standard of *Craig* v. *Boren*, 429 U. S. 190 (1976), *Califano* v. *Webster*, 430 U. S. 313 (1977), *Reed* v. *Reed*, 404 U. S. 71 (1971), and *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920). Rather, it is the generally applicable standard of *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961):

> "The constitutional safeguard [of the Equal Protection Clause] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

See also *Dandridge* v. *Williams*, 397 U. S. 471 (1970); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307 (1976). Under this standard, it is not fatal if the purpose of the law is not articulated on its face, and there need be only a rational relation to the ascertained purpose.

On this basis, as already indicated, I have no trouble in discerning a rational justification for an ordinance that permits the head of a household to house one, but not two, dependent sons and their children.

Respectfully, therefore, I dissent and would affirm the judgment.

UNITED AIR LINES, INC. *v.* EVANS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 76-333. Argued March 29, 1977—Decided May 31, 1977

Where respondent female flight attendant failed to file a timely claim against petitioner airline for violation of Title VII of the Civil Rights Act of 1964 when her employment was terminated in 1968 pursuant to a later invalidated policy because she got married, petitioner *held* not to commit a present, continuing violation of Title VII by refusing to credit respondent, after rehiring her in 1972, with pre-1972 seniority, absent any allegation that petitioner's seniority system, which is neutral in its operation, discriminates against former female employees or victims of past discrimination. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, distinguished. Moreover, § 703 (h) of Title VII, which provides that it shall not be an unlawful employment practice to apply different terms of employment pursuant to a bona fide seniority system if any disparity is not the result of intentional discrimination, bars respondent's claim, absent any attack on the *bona fides* of petitioner's seniority system or of any charge that the system is intentionally designed to discriminate because of race, color, religion, sex, or national origin. Pp. 557-560.

534 F. 2d 1247, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 560.

Stuart Bernstein argued the cause for petitioner. On the briefs were *Arnold T. Aikens, Kenneth A. Knutson,* and *Earl G. Dolan.*

Alan M. Levin argued the cause for respondent *pro hac vice.* With him on the brief was *Isaiah S. Dorfman.**

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*Briefs of *amici curiae* urging reversal were filed by *Gordon Dean Booth, Jr.*, for Delta Air Lines, Inc., et al.; and by *Peyton H. Moss, Douglas S.*

MR. JUSTICE STEVENS delivered the opinion of the Court.

Respondent was employed by United Air Lines as a flight attendant from November 1966 to February 1968. She was rehired in February 1972. Assuming, as she alleges, that her separation from employment in 1968 violated Title VII of the Civil Rights Act of 1964,[1] the question now presented is whether the employer is committing a second violation of Title VII by refusing to credit her with seniority for any period prior to February 1972.

Respondent filed charges with the Equal Employment Opportunity Commission in February 1973, alleging that United discriminated and continues to discriminate against her because she is a female. After receiving a letter granting her the right to sue, she commenced this action in the United States District Court for the Northern District of Illinois. Because the District Court dismissed her complaint, the facts which she has alleged are taken as true. They may be simply stated.

During respondent's initial period of employment, United maintained a policy of refusing to allow its female flight attendants to be married.[2] When she married in 1968, she was therefore forced to resign. Although it was subsequently decided that such a resignation violated Title VII, *Sprogis* v. *United Air Lines*, 444 F. 2d 1194 (CA7 1971), cert. denied, 404 U. S. 991, respondent was not a party to that case and did not

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McDowell, and *Robert E. Williams* for the Equal Employment Advisory Council et al.

Jack Greenberg, *James M. Nabrit III*, *Patrick O. Patterson*, and *Barry Goldstein* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* urging affirmance.

[1] 78 Stat. 253. Title VII, as amended, is codified in 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. V).

[2] At that time United required that all flight attendants be female, except on flights between the mainland and Hawaii and on overseas military charter flights. See *Sprogis* v. *United Air Lines*, 444 F. 2d 1194, 1203 (CA7 1971) (Stevens, J., dissenting), cert. denied, 404 U. S. 991.

initiate any proceedings of her own in 1968 by filing a charge with the EEOC within 90 days of her separation.[3] A claim based on that discriminatory act is therefore barred.[4]

In November 1968, United entered into a new collective-bargaining agreement which ended the pre-existing "no marriage" rule and provided for the reinstatement of certain flight attendants who had been terminated pursuant to that rule. Respondent was not covered by that agreement. On several occasions she unsuccessfully sought reinstatement; on February 16, 1972, she was hired as a new employee. Although her personnel file carried the same number as it did in 1968, for seniority purposes she has been treated as though she had no prior service with United.[5] She has not alleged that any other rehired employees were given credit for prior service with United, or that United's administration of the seniority system has violated the collective-bargaining agreement covering her employment.[6]

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[3] Section 706 (d), 78 Stat. 260, 42 U. S. C. § 2000e–5 (d), then provided in part:

"A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred . . . ."

The 1972 amendments to Title VII added a new subsection (a) to § 706. Consequently, subsection (d) was redesignated as subsection (e). At the same time it was amended to enlarge the limitations period to 180 days. See 86 Stat. 105, 42 U. S. C. § 2000e–5 (e) (1970 ed., Supp. V).

[4] Timely filing is a prerequisite to the maintenance of a Title VII action. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 47. See *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U. S. 229, 239–240.

[5] Respondent is carried on two seniority rolls. Her "company" or "system" seniority dates from the day she was rehired, February 16, 1972. Her "stewardess" or "pay" seniority dates from the day she completed her flight attendant training, March 16, 1972. One or both types of seniority determine a flight attendant's wages; the duration and timing of vacations; rights to retention in the event of layoffs and rights to re-employment thereafter; and rights to preferential selection of flight assignments. App. 5–6, 10.

[6] Under the provisions of the collective-bargaining agreement between United and the Air Line Stewardesses and Flight Stewards as represented

Informal requests to credit her with pre-1972 seniority having been denied, respondent commenced this action.[7] The District Court dismissed the complaint, holding that the failure to file a charge within 90 days of her separation in 1968 caused respondent's claim to be time barred, and foreclosed any relief under Title VII.[8]

A divided panel of the Court of Appeals initially affirmed; then, after our decision in *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, the panel granted respondent's petition for

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by the Air Line Pilots Association International for the period 1972–1974, seniority is irrevocably lost or broken after the separation from employment of a flight attendant *"who resigns or whose services with the Company are permanently severed for just cause."* Brief for Respondent 6.

[7] The relief requested in respondent's complaint included an award of seniority to the starting date of her initial employment with United, and backpay "lost as a result of the discriminatory employment practices of [United]." App. 8. In her brief in this Court, respondent states that she seeks backpay only since her date of rehiring, February 16, 1972, which would consist of the increment in pay and benefits attributable to her lower seniority since that time. Brief for Respondent 4.

[8] The District Court recited that the motion was filed pursuant to Fed. Rule Civ. Proc. 12 (b)(1) and dismissed the complaint on the ground that it had no jurisdiction of a time-barred claim. The District Court also held, however, that the complaint did not allege any continuing violation. For that reason, the complaint was ripe for dismissal under Rule 12 (b)(6). The District Court stated:

"Plaintiff asserts that by defendant's denial of her seniority back to the starting date of her original employment in 1966, United is currently perpetuating the effect of past discrimination.

"Plaintiff, however, has not been suffering from any 'continuing' violation. She is seeking to have this court merely reinstate her November, 1966 seniority date which was lost solely by reason of her February, 1968 resignation. The fact that that resignation was the result of an unlawful employment practice is irrelevant for purposes of these proceedings because plaintiff lost her opportunity to redress that grievance when she failed to file a charge within ninety days of February, 1968. United's subsequent employment of plaintiff in 1972 cannot operate to resuscitate such a time-barred claim." App. 18.

rehearing and unanimously reversed. 534 F. 2d 1247 (CA7 1976). We granted certiorari, 429 U. S. 917, and now hold that the complaint was properly dismissed.

Respondent recognizes that it is now too late to obtain relief based on an unlawful employment practice which occurred in 1968. She contends, however, that United is guilty of a present, continuing violation of Title VII and therefore that her claim is timely.[9] She advances two reasons for holding that United's seniority system illegally discriminates against her: First, she is treated less favorably than males who were hired after her termination in 1968 and prior to her re-employment in 1972; second, the seniority system gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination. Neither argument persuades us that United is presently violating the statute.

It is true that some male employees with less total service than respondent have more seniority than she. But this disparity is not a consequence of their sex, or of her sex. For females hired between 1968 and 1972 also acquired the same preference over respondent as males hired during that period. Moreover, both male and female employees who had service prior to February 1968, who resigned or were terminated for a nondiscriminatory reason (or for an unchallenged discriminatory reason), and who were later re-employed, also were treated as new employees receiving no seniority credit for their prior service. Nothing alleged in the complaint indicates that United's seniority system treats existing female employees differently from existing male employees, or that the failure to

[9] Respondent cannot rely for jurisdiction on the single act of failing to assign her seniority credit for her prior service at the time she was rehired, for she filed her discrimination charge with the Equal Employment Opportunity Commission on February 21, 1973, more than one year after she was rehired on February 16, 1972. The applicable time limit in February 1972, was 90 days; effective March 24, 1972, this time was extended to 180 days, see n. 3, *supra*.

credit prior service differentiates in any way between prior service by males and prior service by females. Respondent has failed to allege that United's seniority system differentiates between similarly situated males and females on the basis of sex.

Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706 (d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

Respondent emphasizes the fact that she has alleged a *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists. She has not alleged that the system discriminates against former female employees or that it treats former employees who were discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a nondiscriminatory reason. In short, the system is neutral in its operation.[10]

Our decision in *Franks* v. *Bowman Transportation Co., supra,* does not control this case. In *Franks* we held that retroactive seniority was an appropriate remedy to be awarded under § 706 (g) of Title VII, 42 U. S. C. § 2000e–5 (g) (1970

[10] This case does not involve any claim by respondent that United's seniority system deterred her from asserting any right granted by Title VII. It does not present the question raised in the so-called departmental seniority cases. See, *e. g., Quarles* v. *Philip Morris, Inc.,* 279 F. Supp. 505 (ED Va. 1968).

ed., Supp. V), after an illegal discriminatory act or practice had been proved, 424 U. S., at 762–768. When that case reached this Court, the issues relating to the timeliness of the charge [11] and the violation of Title VII [12] had already been decided; we dealt only with a question of remedy. In contrast, in the case now before us we do not reach any remedy issue because respondent did not file a timely charge based on her 1968 separation and she has not alleged facts establishing a violation since she was rehired in 1972.[13]

The difference between a remedy issue and a violation issue is highlighted by the analysis of § 703 (h) of Title VII in *Franks*.[14] As we held in that case, by its terms that section does not bar the award of retroactive seniority after a violation has been proved. Rather, § 703 (h) "delineates which employment practices are illegal and thereby prohibited and which are not," 424 U. S., at 758.

That section expressly provides that it shall not be an unlawful employment practice to apply different terms of em-

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[11] The Court of Appeals had disposed of the timeliness issues in *Franks*, 495 F. 2d 398, 405 (CA5 1974).

[12] This finding of the District Court was unchallenged in the Court of Appeals, *id.*, at 402, 403, and was assumed in this Court, 424 U. S., at 750. In any event we noted in *Franks:* "The underlying legal wrong affecting [the class] is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system." *Id.*, at 758.

[13] At the time she was rehired in 1972, respondent had no greater right to a job than any other applicant for employment with United. Since she was in fact treated like any other applicant when she was rehired, the employer did not violate Title VII in 1972. And if the employer did not violate Title VII in 1972 by refusing to credit respondent with back seniority, its continued adherence to that policy cannot be illegal.

[14] Section 703 (h), 78 Stat. 257, 42 U. S. C. § 2000e–2 (h), provides:

"Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . ."

ployment pursuant to a bona fide seniority system, provided that any disparity is not the result of intentional discrimination. Since respondent does not attack the bona fides of United's seniority system, and since she makes no charge that the system is intentionally designed to discriminate because of race, color, religion, sex, or national origin, § 703 (h) provides an additional ground for rejecting her claim.

The Court of Appeals read § 703 (h) as intended to bar an attack on a seniority system based on the consequences of discriminatory acts which occurred prior to the effective date of Title VII in 1965,[15] but having no application to such attacks based on acts occurring after 1965. This reading of § 703 (h) is too narrow. The statute does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory. But such a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer. A contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitations. Such a result would contravene the mandate of § 703 (h).

The judgment of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

But for her sex, respondent Carolyn Evans presently would enjoy all of the seniority rights that she seeks through this litigation. Petitioner United Air Lines has denied her those rights pursuant to a policy that perpetuates past discrimination by awarding the choicest jobs to those possessing a

[15] 534 F. 2d, at 1251.

credential married women were unlawfully prevented from acquiring: continuous tenure with United. While the complaint respondent filed in the District Court was perhaps inartfully drawn,[1] it adequately draws into question this policy of United's.

For the reasons stated in the Court's opinion and in my separate opinion in *Teamsters* v. *United States, ante,* at 378, I think it indisputable that, absent § 703 (h), the seniority system at issue here would constitute an "unlawful employment practice" under Title VII, 42 U. S. C. § 2000e–2 (a)(2) (1970 ed., Supp. V). And for the reasons developed at length in my separate opinion in *Teamsters, ante,* at 381–394, I believe § 703 (h) does not immunize seniority systems that perpetuate post-Act discrimination.

The only remaining question is whether Ms. Evans' complaint is barred by the applicable statute of limitations, 42 U. S. C. § 2000e–5 (e) (1970 ed., Supp. V). Her cause of action accrued, if at all, at the time her seniority was recomputed after she was rehired. Although she apparently failed to file a charge with the EEOC within 180 days after her seniority was determined, Title VII recognizes that certain violations, once commenced, are continuing in nature. In these instances, discriminatees can file charges at any time up to 180 days after the violation ceases. (They can, however, receive backpay only for the two years preceding the filing of charges with the Equal Employment Opportunity Commission. 42 U. S. C. § 2000e–5 (g) (1970 ed., Supp. V).) In

[1] Although the District Court dismissed respondent's complaint for lack of jurisdiction pursuant to Fed. Rule Civ. Proc. 12 (b)(1), the basis for its ruling was that the complaint was time barred. Thus, the dismissal closely resembles a dismissal for failure to state a claim upon which relief can be granted, and the only issue before us is whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Conley* v. *Gibson,* 355 U. S. 41, 45–46 (1957).

the instant case, the violation—treating respondent as a new employee even though she was wrongfully forced to resign—is continuing to this day. Respondent's charge therefore was not time barred, and the Court of Appeals judgment reinstating her complaint should be affirmed.[2]

[2] It is, of course, true that to establish her entitlement to relief, respondent will have to prove that she was unlawfully forced to resign more than 180 days prior to filing her charge with the EEOC. But if that is sufficient to defeat her claim, then discriminatees will never be able to challenge "practices, procedures, or tests . . . [which] operate to 'freeze' the status quo of prior discriminatory employment practices," *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430 (1971), even though *Griggs* holds that such practices are impermissible, and the legislative history of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, indicates that Congress agrees, see *Teamsters* v. *United States*, *ante*, at 391–393 (MARSHALL, J., concurring in part and dissenting in part). The consequence of Ms. Evans' failure to file charges after she was discharged is that she has lost her right to backpay, not her right to challenge present wrongs.

SCARBOROUGH *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75-1344. Argued March 2, 1977—Decided June 6, 1977

In a prosecution for possession of a firearm in violation of the provision of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. App. § 1202 (a), making it a crime for a convicted felon to possess "in commerce or affecting commerce" any firearm, proof that the possessed firearm previously traveled at some time in interstate commerce *held* sufficient to satisfy the statutorily required nexus between possession and commerce. This is so, where, as in this case, the firearm in question traveled in interstate commerce before the accused became a convicted felon; the nexus need not be "contemporaneous" with the possession. Both the text and legislative history of the statute show a congressional intent to require no more than the minimal nexus that the firearm have been, at some time, in interstate commerce and to outlaw possession broadly, with little concern for when the nexus with commerce occurred. Pp. 567-577.

539 F. 2d 331, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. STEWART, J., filed a dissenting opinion, *post*, p. 578. REHNQUIST, J., took no part in the consideration or decision of the case.

Philip J. Hirschkop argued the cause and filed a brief for petitioner.

Richard A. Allen argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Thornburgh,* and *Sidney M. Glazer.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner was convicted of possessing a firearm in violation of Title VII of the Omnibus Crime Control and Safe Streets

Act of 1968 (Omnibus Crime Control Act), 18 U. S. C. App. §§ 1201–1203. The statute provides, in pertinent part:

> "Any person who—
>
> "(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . .
>
> . . . . .
>
> "and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both." 18 U. S. C. App. § 1202 (a).[1]

The issue in this case is whether proof that the possessed firearm previously traveled in interstate commerce is sufficient to satisfy the statutorily required nexus between the possession of a firearm by a convicted felon and commerce.

I

In 1972 petitioner pleaded guilty in the Circuit Court of Fairfax County, Va., to the felony of possession of narcotics with intent to distribute. A year later, in August 1973, law

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[1] Section 1202 (a) reads in full:

"(a) Any person who—

"(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

"(2) has been discharged from the Armed Forces under dishonorable conditions, or

"(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

"(4) having been a citizen of the United States has renounced his citizenship, or

"(5) being an alien is illegally or unlawfully in the United States,

"who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

enforcement officials, in the execution of a search warrant for narcotics, seized four firearms from petitioner's bedroom. Petitioner was subsequently charged with both receipt and possession of the four firearms in violation of 18 U. S. C. App. § 1202 (a)(1).

In a jury trial in the Eastern District of Virginia, the Government offered evidence to show that all of the seized weapons had traveled in interstate commerce. All the dates established for such interstate travel were prior to the date petitioner became a convicted felon.[2] The Government made no attempt to prove that the petitioner acquired these weapons after his conviction.[3] Holding such proof necessary for a receipt conviction, the judge, at the close of the Government's case, granted petitioner's motion for a judgment of acquittal on that part of the indictment charging receipt.

Petitioner's defense to the possession charge was twofold. As a matter of fact, he contended that by the time of his conviction he no longer possessed the firearms. His claim was that, to avoid violating this statute, he had transferred these guns to his wife prior to pleading guilty to the narcotics felony. Secondly, he argued that, as a matter of law, proof that the

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[2] The Government's evidence showed that the Colt revolver was shipped from Connecticut to North Carolina in 1969 and entered Virginia by unknown means, App. 6–7; that the Universal Enforcer came from Florida to Virginia in 1969 and was purchased by petitioner in 1970, *id.*, at 7–8; that the M–1 carbine rifle was sent to Maryland from Illinois in 1966, coming to Virginia by unknown means, *id.*, at 8–9; and that the St. Etienne Ordinance revolver was manufactured in France in the 19th century and was somehow later brought into Virginia, *id.*, at 9–10.

[3] The Government showed that petitioner bought the Enforcer in 1970. The only evidence regarding acquisition of the other weapons came from petitioner. He claimed he purchased the Colt revolver in 1970, Tr. 88, and the M–1 rifle in 1968, *id.*, at 108. The French revolver, he claimed, was left in his house shortly before the state conviction but he was not sure by whom. *Id.*, at 88, 105.

guns had at some time traveled in interstate commerce did not provide an adequate nexus between the possession and commerce. In furtherance of this defense, petitioner requested that the jury be instructed as follows:

> "In order for the defendant to be found guilty of the crime with which he is charged, it is incumbent upon the Government to demonstrate a nexus between the 'possession' of the firearms and interstate commerce. For example, a person 'possesses' in commerce or affecting commerce if at the time of the offense the firearms were moving interstate or on an interstate facility, or if the 'possession' affected commerce. It is not enough that the Government merely show that the firearms at some time had travelled in interstate commerce. . . ." App. 12–13.

The judge rejected this instruction. Instead he informed the jury:

> "The government may meet its burden of proving a connection between commerce and the possession of a firearm by a convicted felon if it is demonstrated that the firearm possessed by a convicted felon had previously travelled in interstate commerce.
>
> . . . . .
>
> "It is not necessary that the government prove that the defendant purchased the gun in some state other than that where he was found with it or that he carried it across the state line, nor must the government prove who did purchase the gun." *Id.*, at 14.

Petitioner was found guilty and he appealed. The Court of Appeals for the Fourth Circuit affirmed. 539 F. 2d 331. It held that the interstate commerce nexus requirement of the possession offense was satisfied by proof that the firearm petitioner possessed had previously traveled in interstate com-

merce. In view of the split among the Circuits on this issue,[4] we granted certiorari. 429 U. S. 815 (1976).[5] We affirm.

II

Our first encounter with Title VII of the Omnibus Crime Control Act came in *United States* v. *Bass*, 404 U. S. 336 (1971). There we had to decide whether the statutory phrase "in commerce or affecting commerce" in § 1202 (a) applied to "possesses" and "receives" as well as to "transports." We noted that the statute was not a model of clarity. On the one hand, we found "significant support" in the legislative history for the contention that the statute "reaches the mere possession of guns without any showing of an interstate commerce nexus" in individual cases. 404 U. S., at 345–346. On the other hand, we could not ignore Congress' inserting the phrase "in commerce or affecting commerce" in the statute. *Id.*, at 345. The phrase clearly modified "trans-

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[4] Agreeing with the Fourth Circuit that proof of previous interstate movement of the firearm provides a sufficient commerce nexus for the possession offense are the Sixth Circuit, *United States* v. *Jones*, 533 F. 2d 1387 (1976), and the Tenth Circuit, *United States* v. *Bumphus*, 508 F. 2d 1405 (1975) (dictum). Three other Circuits have indicated that such proof is adequate for a receipt offense but that the possession offense requires that the possession have a contemporaneous nexus with commerce. *United States* v. *Ressler*, 536 F. 2d 208 (CA7 1976); *United States* v. *Bell*, 524 F. 2d 202 (CA2 1975); *United States* v. *Steeves*, 525 F. 2d 33 (CA8 1975) (dictum). The Ninth Circuit apparently has an intra-Circuit conflict. Compare *United States* v. *Malone*, 538 F. 2d 250 (1976), and *United States* v. *Cassity*, 509 F. 2d 682 (1974), with *United States* v. *Burns*, 529 F. 2d 114 (1975).

[5] The grant of the petition was limited to the question "[w]hether the Court erred in holding that a conviction under 18 U. S. C. App. § 1202 (a) for possession of a firearm in commerce or affecting commerce by a convicted felon is sustainable merely upon a showing that the possessed firearm has previously at any time however remote travelled in interstate commerce." Petitioner's Fourth Amendment claim was excluded.

port" and we could find no sensible explanation for requiring a nexus only for transport. *Id.*, at 340. Faced with this ambiguity,[6] the Court adopted the narrower reading that the phrase modified all three offenses. We found this result dictated by two principles of statutory interpretation: First, that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *Rewis* v. *United States*, 401 U. S. 808, 812 (1971), and second, that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance," *Bass, supra*, at 349. Since "[a]bsent proof of some interstate commerce nexus in each case § 1202 (a) dramatically intrudes upon traditional state criminal jurisdiction," 404 U. S., at 350, we were unwilling to conclude, without a "clearer statement of intention," *ibid.*, that Congress meant to dispense entirely with a nexus requirement in individual cases.

It was unnecessary in *Bass* for us to decide what would constitute an adequate nexus with commerce as the Government had made no attempt to show any nexus at all. While we did suggest some possibilities,[7] the present case presents the first opportunity to focus on the question with the benefit of full briefing and argument.

The Government's position is that to establish a nexus with interstate commerce it need prove only that the firearm possessed by the convicted felon traveled at some time in interstate commerce. The petitioner contends, however, that the nexus must be "contemporaneous" with the possession, that the statute proscribes "only crimes with a present connection to commerce." Brief for Petitioner 9. He suggests that at the time of the offense the possessor must be engaging

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[6] As one commentator described our dilemma: "[T]he legislative history looked one way and the logic and structure of the statute another, while the language was not clear." Stern, The Commerce Clause Revisited—The Federalization of Intrastate Crime, 15 Ariz. L. Rev. 271, 281 (1973).

[7] See n. 11, *infra*.

in commerce or must be carrying the gun at an interstate facility. Tr. of Oral Arg. 11. At oral argument he suggested an alternative theory—that one can be convicted for possession without any proof of a present connection with commerce so long as the firearm was acquired after conviction. *Id.*, at 15.

In our effort to resolve the dispute, we turn first to the text of the statute. Petitioner contends that the meaning can be readily determined from the face of the statute, at least when it is contrasted with Title IV of the Omnibus Crime Control Act, another title dealing with gun control.[8] He points to one section of Title IV, 18 U. S. C. § 922 (h), arguing, in reliance on our decision in *Barrett* v. *United States*, 423 U. S. 212 (1976), that this section shows how Congress can, if it chooses, specify an offense based on firearms that have previously traveled in commerce. In § 922 (h), Congress employed the present perfect tense, as it prohibited a convicted felon from receiving a firearm "which has been shipped or transported in interstate or foreign commerce." This choice of tense led us to conclude in *Barrett* that Congress clearly "denot[ed] an act that has been completed." 423 U. S., at 216. Thus, petitioner argues, since Congress knows how to specify completed transactions, its failure to use that language in the present statute must mean that it wanted to reach only ongoing transactions.

The essential difficulty with this argument is that it is not very meaningful to compare Title VII with Title IV. See *Bass*, 404 U. S., at 344. Title VII was a last-minute amendment to the Omnibus Crime Control Act enacted hastily with little discussion and no hearings.[9] The statute, as we noted in

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[8] The provisions of Title IV of the Omnibus Crime Control Act were re-enacted later that year without relevant change in the Gun Control Act of 1968, 82 Stat. 1213. For convenience, those provisions are referred to here collectively as Title IV.

[9] Senator Long introduced it on the floor of the Senate on May 17, 1968. About a week later he explained his amendment again; there was

Bass, is not the product of model legislative deliberation or draftsmanship. *Id.*, at 339, 344. Title IV, on the other hand, is a carefully constructed package of gun control legislation. It is obvious that the tenses used throughout Title IV were chosen with care. For example, in addition to the prohibition in § 922 (h) on receipt by convicted felons, Congress also made it illegal in § 922 (g) for such person to "ship or transport any firearm or ammunition in interstate or foreign commerce." In § 922 (j), Congress made it unlawful for "any person to receive, conceal, store, barter, sell or dispose of any stolen firearm . . . , which is moving as, which is part of, or which constitutes, interstate or foreign commerce." And § 922 (k) makes it illegal for "any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had [its] serial number removed, obliterated or altered." In view of such fine nuances in the tenses employed in the statute, the Court could easily conclude in *Barrett* that "Congress knew the significance and meaning of the language it employed." 423 U. S., at 217. The language it chose was "without ambiguity." *Id.*, at 216. "Had Congress intended to confine § 922 (h) to direct interstate receipts, it would have so provided, just as it did in other sections of [Title IV]." *Id.*, at 217.

In the present case, by contrast, Congress' choice of language was ambiguous at best. While it is true that Congress did not choose the precise language used in § 922 (h) to indicate that a present nexus with commerce is not required, neither did it use the language of § 922 (j) to indicate that the gun must have a contemporaneous connection with commerce at the time of the offense. Thus, while petitioner is correct

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brief debate; a vote was called; and the amendment was agreed to without having been referred to any committee. Accordingly, there were no legislative hearings and no committee reports. The amendment received only passing mention in the House discussion of the bill and never received committee consideration there either.

in noting that Congress has the skills to be precise, the fact that it did not employ those skills here helps us not at all.

While Congress' choice of tenses is not very revealing, its findings and its inclusion of the phrase "affecting commerce" are somewhat more helpful. In the findings at the beginning of Title VII, Congress expressly declared that "the receipt, possession, or transportation of a firearm by felons . . . constitutes . . . a burden on commerce or threat affecting the free flow of commerce," 18 U. S. C. App. § 1201 (1).[10] It then implemented those findings by prohibiting possessions "in commerce and affecting commerce." As we have previously observed, Congress is aware of the "distinction between legislation limited to activities 'in commerce' and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce." *United States* v. *American Bldg. Maintenance Industries*, 422 U. S. 271, 280 (1975); see also *NLRB* v. *Reliance Fuel Corp.*, 371 U. S. 224, 226 (1963). Indeed, that awareness was explicitly demonstrated here. In arguing that Congress could,

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[10] Title 18 U. S. C. App. § 1201 reads in its entirety:

"Congressional findings and declaration.

"The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—

"(1) a burden on commerce or threat affecting the free flow of commerce,

"(2) a threat to the safety of the President of the United States and Vice President of the United States,

"(3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and

"(4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution."

consistent with the Constitution, "outlaw the mere possession of weapons," Senator Long, in introducing Title VII, pointed to the fact that "many of the items and transactions reached by the broad swath of the Civil Rights Act of 1964 were reached by virtue of the power of Congress to regulate matters affecting commerce, not just to regulate interstate commerce itself." 114 Cong. Rec. 13868 (1968). He advised a similar reliance on the power to regulate matters affecting commerce and urged that "Congress simply [find] that the possession of these weapons by the wrong kind of people is either a burden on commerce or a threat that affects the free flow of commerce." *Id.*, at 13869. While in *Bass* we noted that we could not be sure that Congress meant to do away entirely with a nexus requirement, it does seem apparent that in implementing these findings by prohibiting both possessions in commerce and those affecting commerce, Congress must have meant more than to outlaw simply those possessions that occur in commerce or in interstate facilities. And we see no basis for contending that a weapon acquired after a conviction affects commerce differently from one acquired before and retained.

The legislative history in its entirety, while brief, further supports the view that Congress sought to rule broadly—to keep guns out of the hands of those who have demonstrated that "they may not be trusted to possess a firearm without becoming a threat to society." *Id.*, at 14773. There is simply no indication of any concern with either the movement of the gun or the possessor or with the time of acquisition.

In introducing the amendment, Senator Long stated:

> "I have prepared an amendment which I will offer at an appropriate time, simply setting forth the fact that anybody who has been convicted of a felony . . . is not permitted to possess a firearm . . . .
>
> "It might be well to analyze, for a moment, the logic involved. When a man has been convicted of a felony,

unless—as this bill sets forth—he has been expressly pardoned by the President and the pardon states that the person is to be permitted to possess firearms in the future, that man would have no right to possess firearms. He would be punished criminally if he is found in possession of them.

. . . . .

"It seems to me that this simply strikes at the possession of firearms by the wrong kind of people. It avoids the problem of imposing on an honest hardware store owner the burden of keeping a lot of records and trying to keep up with the ultimate disposition of weapons sold. It places the burden and the punishment on the kind of people who have no business possessing firearms in the event they come into possession of them." *Id.*, at 13868–13869.

The purpose of the amendment was to complement Title IV. *Id.*, at 14774; see also *id.*, at 16286. Senator Long noted:

"Of all the gun bills that have been suggested, debated, discussed and considered, none except this Title VII attempts to bar possession of a firearm from persons whose prior behaviors have established their violent tendencies. . . .

". . . Under Title VII, every citizen could possess a gun until the commission of his first felony. Upon his conviction, however, Title VII would deny every assassin, murderer, thief and burglar of [*sic*] the right to possess a firearm in the future . . . .

. . . . .

"Despite all that has been said about the need for controlling firearms in this Country, no other amendment heretofore offered would get at the Oswalds or the Galts. They are the types of people at which Title VII is aimed." *Id.*, at 14773–14774.

He proposed this amendment to remedy what he thought was an erroneous conception of the drafters of Title IV that there was "a constitutional doubt that the Federal Government could outlaw the mere possession of weapons." *Id.*, at 13868.

The intent to outlaw possession without regard to movement and to apply it to a case such as petitioner's could not have been more clearly revealed than in a colloquy between Senators Long and McClellan:

> "Mr. McClellan. I have not had an opportunity to study the amendment. . . . The thought that occurred to me, as the Senator explained it, is that if a man had been in the penitentiary, had been a felon, and had been pardoned, without any condition in his pardon to which the able Senator referred, granting him the right to bear arms, could that man own a shotgun for the purpose of hunting?
>
> "Mr. Long of Louisiana. No, he could not. He could own it, but he could not possess it.
>
> "Mr. McClellan. I beg the Senator's pardon?
>
> "Mr. Long of Louisiana. This amendment does not seek to do anything about who owns a firearm. He could not carry it around; he could not have it.
>
> "Mr. McClellan. *Could he have it in his home?*
>
> "Mr. Long of Louisiana. *No, he could not.*" *Id.*, at 14774 (emphasis added).

It was after this colloquy that Senator McClellan suggested that the amendment be taken to conference for "further thought." *Ibid.* While that appeared to be its destination, the House, after Senate passage of the bill, defeated a motion to go to conference and adopted the entire Senate bill, including Title VII, without alteration. *Id.*, at 16077–16078, 16299–16300. Title VII thus became law without modification.

It seems apparent from the foregoing that the purpose of Title VII was to proscribe mere possession but that there was some concern about the constitutionality of such a statute. It was that observed ambivalence that made us unwilling in *Bass* to find the clear intent necessary to conclude that Congress meant to dispense with a nexus requirement entirely. However, we see no indication that Congress intended to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce.[11] In particular, we find no support for petitioner's theories.

Initially, we note our difficulty in fully comprehending petitioner's conception of a nexus with commerce. In his view, if an individual purchases a gun before his conviction, the fact that the gun once traveled in commerce does not provide an adequate nexus. It is necessary, in addition, that the person also carry it in an interstate facility. If, however, one purchases the same gun from the same dealer one day after the conviction as opposed to one day before, somehow the nexus magically appears, regardless of whether the purchaser carries the gun in any particular place. Such an interpretation strains credulity. We find no evidence in either the language or the legislative history for such a construction.[12]

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[11] In *Bass*, the Court suggested that there might be a distinction between receipt and possession and that possession might require a stricter nexus with commerce. While such a requirement would make sense, see *United States* v. *Bell*, 524 F. 2d, at 209, further consideration has persuaded us that that was not the choice Congress made. Congress was not particularly concerned with the impact on commerce except as a means to insure the constitutionality of Title VII. State gun control laws were found "inadequate to bar possession of firearms from those most likely to use them for unlawful purposes" and Congress sought to buttress the States' efforts. 114 Cong. Rec. 14774 (1968). All indications are that Congress meant to reach possessions broadly.

[12] The argument sounds more like an effort to define possession, but the only issue before us is the nexus requirement. Petitioner has raised no objections to the trial court's definition of possession. Even as a pro-

More significantly, these theories create serious loopholes in the congressional plan to "make it unlawful for a firearm . . . to be in the possession of a convicted felon." 114 Cong. Rec. 14773 (1968). A person who obtained a firearm prior to his conviction can retain it forever so long as he is not caught with it in an interstate facility. Indeed, petitioner's interpretation allows an individual to go out in the period between his arrest and conviction and purchase and stockpile weapons with impunity. In addition, petitioner's theories would significantly impede enforcement efforts. Those who do acquire guns after their conviction obviously do so surreptitiously and, as petitioner concedes, Tr. of Oral Arg. 19, it is very difficult as a practical matter to prove that such possession began after the possessor's felony conviction.

Petitioner responds that the Government's reading of the statute fails to give effect to all three terms of the statute—receive, possess, transport. He argues that someone guilty of receipt or transport will necessarily be guilty of possession and that, therefore, there was no need to include the other two offenses in the statute. While this contention is not frivolous,[13] the fact is that petitioner's theory is similarly vulnerable. By his proposed definitions, there are essentially only two crimes—receipt and transport. The possessor who acquires the weapon after his conviction is guilty of receipt and the one who is carrying the gun in commerce or at an inter-

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posed definition of possession, however, there is no support for it in the history or text. While Senator Long used the word "acquire" a few times in discussing the amendment, it is clear his concern was with the dangers of certain people having guns, not with when they obtained them. Furthermore, his use of the term "acquire" is better explained as a synonym for "receive" than for "possess." See *United States* v. *Kelly*, 519 F. 2d 251, 253 n. 3 (CA8 1975).

[13] We note, however, that it is also arguable that one could receive and perhaps transport a weapon without necessarily exercising dominion and control over it.

state facility presumably is guilty of transporting.[14] Thus, the definitions offered by both sides fail to give real substance to all three terms. The difference, however, is that the Government's definition captures the essence of Congress' intent, striking at the possession of weapons by people "who have no business possessing [them]." 114 Cong. Rec. 13869 (1968). Petitioner's version, on the other hand, fails completely to fulfill the congressional purpose. It virtually eliminates the one offense on which Congress focused in enacting the law.

Finally, petitioner seeks to invoke the two principles of statutory construction relied on in *Bass*—lenity in construing criminal statutes and caution where the federal-state balance is implicated. Petitioner, however, overlooks the fact that we did not turn to these guides in *Bass* until we had concluded that "[a]fter 'seizing every thing from which aid can be derived,' . . . we are left with an ambiguous statute." 404 U. S., at 347. The principles are applicable only when we are uncertain about the statute's meaning and are not to be used "in complete disregard of the purpose of the legislature." *United States* v. *Bramblett*, 348 U. S. 503, 510 (1955). Here, the intent of Congress is clear. We do not face the conflicting pull between the text and the history that confronted us in *Bass*. In this case, the history is unambiguous and the text consistent with it. Congress sought to reach possessions broadly, with little concern for when the nexus with commerce occurred. Indeed, it was a close question in *Bass* whether § 1202 (a) even required proof of any nexus at all in individual cases. The only reason we concluded it did was because it was not "plainly and unmistakably" clear that it did not. 404 U. S., at 348. But there is no question that Congress intended no more than a minimal nexus requirement.

[14] Petitioner suggests that a possessor's simply waiting in an interstate facility is not transporting. Even if that is true, we find it inconceivable, in view of the legislative history, that Congress intended the possession offense to have so limited a scope.

Since the District Court and the Court of Appeals employed the proper standard, we affirm the conviction of petitioner.

It is so ordered.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, dissenting.

So far as the record reflects, the petitioner in this case acquired the four weapons in question before he was convicted of a felony in August 1972. Until that time, his possession of the guns was entirely legal under federal law. Under the Court's construction of 18 U. S. C. App. § 1202 (a)(1), however, the petitioner was automatically guilty of a serious federal criminal offense at the moment he was convicted in the state felony case. This result is in my view inconsistent with the time-honored rule of lenity in construing federal criminal statutes. See, *e. g.*, *Rewis* v. *United States*, 401 U. S. 808, 812; *Ladner* v. *United States*, 358 U. S. 169, 177–178; *Bell* v. *United States*, 349 U. S. 81, 83; *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221–222. I would hold that § 1202 (a)(1) does not come into play unless and until a person first comes into possession of a firearm *after* he is convicted of a felony.

The language of § 1202 (a)(1) does not compel the construction that the Court adopts. The statute covers "[a]ny person who . . . has been convicted . . . of a felony . . . and who receives, possesses, or transports . . . any firearm . . . ." Plainly the acts of receiving and transporting are prohibited only if they occur after the defendant's conviction. The language does not indicate, however, whether the illegal possession must also first begin after conviction, or whether a prior possession becomes illegal at the moment the possessor is adjudged guilty of a felony. And, as the Court observes, *ante*, at 576–577, any reading of the statute makes

one or another part of it redundant. If § 1202 (a) makes criminal any postconviction possession of a gun by a convicted felon, then there will almost never be a situation where the Government would need to rely on the prohibition against receipt of the gun, for in most cases receipt would result in possession, and the latter is generally easier to prove. On the other hand, if the prohibition against possession refers to a possession that begins only after a felony conviction, the Government presumably could proceed on a receipt charge in such cases, without relying on the possession offense (or vice versa).

The legislative history does not provide much help. There are statements suggesting that Congress meant to proscribe any possession of a firearm by a convicted felon. Other statements, however, intimate that the statute's purpose was to prevent a convicted felon from *coming into possession* of a weapon after his conviction. For instance, Senator Long, the drafter and sponsor of § 1202, stated that the statute "places the burden and the punishment on the kind of people who have no business possessing firearms *in the event they come into possession of them.*" 114 Cong. Rec. 13869 (1968). Later he added that § 1202 (a) "would deny every assassin, murderer, thief and burglar . . . the right to possess a firearm *in the future* . . . ." 114 Cong. Rec. 14773.

In short, I disagree with the Court that the scope of § 1202 (a) is so crystal clear that there is no room for the operation of the rule of lenity. In my view, we are under no mandate to construe this statute so that a person in lawful possession of a firearm, and presumed to be innocent of a felony until proved guilty, must upon his conviction of a felony also be automatically and instantly guilty of a wholly different serious criminal offense.[1] The statute could equally

[1] Under this construction, for example, a bookkeeper who owns a hunting rifle and who later commits embezzlement will, immediately upon his embezzlement conviction, also be guilty of violating § 1202 (a). At oral argument the Government agreed that such a person should have a reason-

be read to apply only when a person first comes into possession of a firearm after his felony conviction.[2] That being so, I would choose the latter alternative, for "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication." *United States* v. *Universal C. I. T. Credit Corp., supra,* at 222.

Since the petitioner in this case came into possession of the firearms before he was convicted of any felony, I would hold that he did not violate § 1202 (a)(1). Accordingly, I respectfully dissent from the opinion and judgment of the Court.

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able time to relinquish possession without being automatically in violation of the statute, and suggested that prosecutorial discretion would take care of the problem. Proper construction of a criminal statute, however, cannot depend upon the good will of those who must enforce it.

[2] Contrary to the Court's suggestion, this reading would not allow a person "to go out in the period between his arrest and conviction and purchase and stockpile weapons with impunity." *Ante,* at 576. Title 18 U. S. C. § 922 (h) makes it unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to receive any firearm or ammunition that has been shipped or transported in interstate or foreign commerce.

Syllabus

ALABAMA POWER CO. *v.* DAVIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 76–451. Argued April 25–26, 1977—Decided June 6, 1977

Respondent, who left employment with petitioner for military service but who returned after completion of such service and continued in employment until his retirement, *held* entitled under § 9 of the Military Selective Service Act, which requires an employer to rehire a returning veteran without loss of seniority, to credit toward his pension under petitioner's pension plan for his period of military service. Pp. 583–594.

(a) A benefit is a right of seniority secured to a veteran by § 9 if it would have accrued with reasonable certainty, as opposed to being subject to a significant contingency, had the veteran been continuously employed by the employer, *McKinney* v. *Missouri-K.-T. R. Co.*, 357 U. S. 265; *Tilton* v. *Missouri Pac. R. Co.*, 376 U. S. 169, and if it is in the nature of a reward for length of service rather than short-term compensation for services rendered, *Accardi* v. *Pennsylvania R. Co.*, 383 U. S. 225; *Foster* v. *Dravo Corp.*, 420 U. S. 92. Pp. 585–589.

(b) Here, not only is the "reasonable certainty" requirement met on the basis of respondent's work history both before and after his military service, but it also appears that the "true nature" of the pension payments is a reward for length of service, especially in view of the lengthy period (20 years or 15 years if age 50) required by the pension plan for pension rights to vest in the employee. Pp. 591–594.

(c) Moreover, respondent's claim is supported by the functions of pension plans in assuring financial security for long-term employees and, by providing such security, in encouraging such employees to retire when their efficiency declines. P. 594.

542 F. 2d 650, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

H. Hampton Boles argued the cause for petitioner. With him on the brief were *John Bingham* and *Marshall Timberlake.*

Allan A. Ryan, Jr., argued the cause for respondent. With him on the brief were *Solicitor General McCree, Assistant*

Attorney General Babcock, Robert E. Kopp, and *William H. Berger.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Respondent Davis became a permanent employee of petitioner Alabama Power Co. on August 16, 1936, and continued to work until March 18, 1943, when he left to enter the military. After serving in the military for 30 months, he resumed his position with Alabama Power, where he worked until he retired on June 1, 1971. Davis received credit under the company pension plan for his service from August 16, 1937,[1] until the date of his retirement, with the exception of the time he spent in the military and some time spent on strike. Davis claimed that § 9 of the Military Selective Service Act of 1967, 50 U. S. C. App. § 459 (b),[2] requires Alabama Power to give him credit toward his pension for his period of military service. With the assistance of the United States Attorney,[3] he sued to vindicate that asserted right. The District Court, 383 F. Supp. 880 (ND Ala. 1974), and the Court of Appeals for the Fifth Circuit, 542 F. 2d 650 (1976), agreed with Davis. Because of the importance of the issue and a conflict among the Circuits,[4] we granted certiorari, 429 U. S. 1037.[5] We affirm.

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*Briefs of *amici curiae* urging reversal were filed by *Hugh M. Finneran* for PPG Industries, Inc.; and by *Carl E. Sanders, Michael C. Murphy,* and *John L. Taylor, Jr.,* for Lockheed-Georgia Co., a division of Lockheed Aircraft Corp.

[1] Employees do not become eligible to participate in the plan until they have worked for one year. See *infra,* at 590.

[2] Section 459 (b) has been recodified, without substantial change, as 38 U. S. C. § 2021 (1970 ed., Supp. V).

[3] See 50 U. S. C. App. § 459 (d), now codified at 38 U. S. C. § 2022 (1970 ed., Supp. V).

[4] Compare *Jackson* v. *Beech Aircraft Corp.,* 517 F. 2d 1322 (CA10 1975) and *Litwicki* v. *Pittsburgh Plate Glass Industries, Inc.,* 505 F. 2d

[*Footnote 5 is on page 583*]

I

The Military Selective Service Act provides the mechanism for manning the Armed Forces of the United States. Section 9 of the Act evidences Congress' desire to minimize the disruption in individuals' lives resulting from the national need for military personnel. It seeks to accomplish this goal by guaranteeing veterans that the jobs they had before they entered the military will be available to them upon their return to civilian life. Specifically, § 9 requires that any qualified person who leaves a permanent position with any employer to enter the military, satisfactorily completes his military service, and applies for re-employment within 90 days of his discharge from the military,

> "be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay . . . unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." 50 U. S. C. App. § 459 (b)(B)(i).

Moreover, any person so restored to a position

> "shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without

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189 (CA3 1974) (denying pension credit), with *Smith* v. *Industrial Employers & Distributors Assn.*, 546 F. 2d 314 (CA9 1976) (granting past service credit and denying future service credit).

[5] The grant of certiorari was limited to the first question presented, excluding the issue of the applicability of the Alabama statute of limitations.

cause within one year after such restoration." 50 U. S. C. App. § 459 (c)(1).

In our first confrontation with the predecessor of § 9,[6] we held that the statutory protection against discharge within a year of re-employment did not protect a veteran from being laid off while nonveterans with greater seniority retained their jobs. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275 (1946). In reaching this conclusion, we announced two principles that have governed all subsequent interpretations of the re-employment rights of veterans. First, we stated that under the Act:

> "[The veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Id.*, at 284–285.

Congress incorporated this doctrine in succeeding re-enactments of the re-employment provision. See 50 U. S. C. App. § 459 (c)(2).[7] The second guiding principle we identified was:

> "This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. . . . And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which

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[6] The Selective Training and Service Act of 1940, c. 720, § 8 (b), 54 Stat. 890.

[7] "It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

This provision is now codified at 38 U. S. C. § 2021 (b)(2) (1970 ed., Supp. V).

Congress has secured the veteran under the Act." 328 U. S., at 285.

Our next cases were also concerned with the extent of the protection afforded rights that were clearly within the Act's scope. *Trailmobile Co.* v. *Whirls*, 331 U. S. 40 (1947); *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521 (1949); *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278 (1949). More recently, however, our efforts have been directed at determining whether a particular right claimed by a veteran is an aspect of the "seniority" which the Act protects. We have been unable to rely on either the language or the legislative history of the Act when making these determinations, for neither contains a definition of "seniority."

We first faced this problem in *McKinney* v. *Missouri-K.-T. R. Co.*, 357 U. S. 265 (1958). McKinney had been re-employed at a higher level than he had attained when he left for military service, with seniority in his new position dating from his return to work. When his job was abolished, he claimed that his seniority at the higher level should have dated from the time he would have been eligible to reach that level had he not served in the military. This Court rejected his claim because of the contingent nature of his expectation of being promoted from the job he previously held. That promotion, the Court found, depended "not simply on seniority or some other form of automatic progression, but on the exercise of discretion on the part of the employer." *Id.*, at 272. Since the promotion would not have come automatically had McKinney continued to ride the seniority escalator, the Court concluded that neither the promotion nor a seniority date calculated as of the time he might have been promoted were incidents of the "seniority" protected by the Act.[8]

[8] "[Section] 9 (c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his if he had not been called to the colors. Much there is that might have flowed

Six years later, the Court again considered whether a veteran was entitled to a seniority date calculated as if he had obtained a higher level position while in the military. *Tilton* v. *Missouri Pac. R. Co.*, 376 U. S. 169 (1964). Tilton had been promoted before he left the railroad to enter the military, but he had not worked enough days to complete the probationary period necessary to obtain permanent status and begin accumulating seniority in the higher level job. When he returned to the railroad, he successfully completed the remainder of the probationary period. The company set his seniority date as of the time he actually finished the probationary period; he claimed that the date should have been fixed as of the time he would have satisfied the probationary work requirement had it not been for his military service.

This Court agreed. Unlike the situation in *McKinney*, we found that the only management discretion involved was the decision to allow Tilton to assume probationary status in the higher level position, and that discretion had been exercised before he entered the military. Tilton's satisfactory completion of the probationary period after he was reinstated by the railroad was sufficient indication that he would have completed that period earlier if his tenure had not been interrupted by his service to his country. The mere possibility that his ride on the escalator might have been interrupted by some other circumstance could not be allowed to deny him the status he almost certainly would have obtained:

> "In every veteran seniority case the possibility exists that work of the particular type might not have been avail-

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from experience, effort, or chance to which he cannot lay claim under the statute. Section 9 (c) does not assure him that the past with all its possibilities of betterment will be recalled. Its very important but limited purpose is to assure that those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service." 357 U. S., at 271–272.

able; that the veteran would not have worked satisfactorily during the period of his absence; that he might not have elected to accept the higher position; or that sickness might have prevented him from continuing his employment. In light of the purpose and history of this statute, however, we cannot assume that Congress intended possibilities of this sort to defeat the veteran's seniority rights." 376 U. S., at 180–181.

In *McKinney* and *Tilton*, the Court decided whether the veterans' promotions were incidents of the "seniority" protected by the Act, but in both cases, the benefit claimed by the veterans—earlier seniority dates—was clearly "seniority." Our most recent cases have involved claims to benefits that could not be so easily classified. These cases have required us to consider not only the relative certainty of the benefit's accrual but also the nature of the benefit itself.

We first encountered this added complexity in *Accardi* v. *Pennsylvania R. Co.*, 383 U. S. 225 (1966), a case involving a claim to severance pay. The petitioners in *Accardi* were tugboat firemen who had left their jobs for military service and had later been restored with appropriate seniority credit. When technological change led to the elimination of the position of tugboat fireman, the railroad agreed to provide severance pay, with the amount of the payment dependent on the employee's length of "compensated service." Since Accardi and his colleagues had not received compensation from the company during their military service, the railroad did not give them credit for that time when calculating their severance payments.

This Court ruled in favor of the firemen. It was clear that had the petitioners remained on their jobs, they would have received severance pay credit for the years they spent in the military. Therefore, the reasonable-certainty criterion established in *McKinney* and *Tilton* was satisfied. The company

argued, however, that the payment was not based on, and so was not an incident of, seniority, but rather was based on total actual service to the railroad. While questioning the company's argument because of the "bizarre results possible under the definition of 'compensated service,' " 383 U. S., at 230,[9] we rejected it because the "real nature" of the payments was compensation for the lost rights and expectations that accrued as the employees' longevity on the job increased. *Ibid.* That nature could not be disguised by use of a "compensated service" formula to calculate the amount of the payments. Accordingly, we concluded that

> "the amount of these allowances is just as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall." *Ibid.*

Failing to credit the veterans with their military service time when calculating their payments therefore violated the Act's requirement that they be reinstated without loss of seniority.[10]

Most recently, in *Foster* v. *Dravo Corp.*, 420 U. S. 92 (1975), we dealt with another claim for payment because of time spent in military service. Foster had worked for his private employer for seven weeks in 1967, spent 18 months in the military, and returned to work for the last 13 weeks of 1968. He claimed that he was entitled to vacation pay for both

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[9] It was possible for an employee to receive credit for a full year of "compensated service" by working only seven well-timed days during the year. The company defined a month of "compensated service" as any month during which the employee worked one or more days, and a year of "compensated service" was defined as 12 such months, or a major portion thereof.

[10] The Court also held that whatever the full scope of the statutory language governing "other benefits" contained in § 459 (c), see *supra*, at 583–584, that language was intended to add to the protections afforded the veteran's seniority rights, not to lessen those protections. 383 U. S., at 231–232. The Court's conclusion that the severance payments were perquisites of seniority therefore made unnecessary consideration of the "other benefits" provision.

years, although the collective-bargaining agreement granted full vacation benefits only for 25 weeks of work in a calendar year.

Again focusing on the nature of the benefit at issue, we rejected Foster's claim. Vacation benefits, we held, are "intended as a form of short-term compensation for work performed," *id.*, at 100, not as a reward for longevity with an employer.[11] In reaching this conclusion, we noted the work requirement imposed by the collective-bargaining contract, the proportionate increase in vacation benefits that resulted from overtime work, and the availability of pro rata benefits if an employee was laid off before he had worked the required number of weeks. These facts, however, were sufficient only to "lend substantial support," *ibid.*, to the employer's argument that the vacation benefits were a form of pay for work done. The nature of the benefits—"the common conception of a vacation as a reward for and respite from a lengthy period of labor," *id.*, at 101—was decisive.

Thus, our cases have identified two axes of analysis for determining whether a benefit is a right of seniority secured to a veteran by § 9. If the benefit would have accrued, with reasonable certainty, had the veteran been continuously employed by the private employer, and if it is in the nature of a reward for length of service, it is a "perquisite of seniority." If, on the other hand, the veteran's right to the benefit at the time he entered the military was subject to a significant contingency, or if the benefit is in the nature of short-term compensation for services rendered, it is not an aspect of seniority within the coverage of § 9. We evaluate respondent Davis' right to pension credit for his years in the military in light of these principles.

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[11] Under the collective-bargaining agreement in *Foster*, the length of an employee's vacation increased with his length of continuous employment with the firm. The company conceded that the employee's time in military service had to be counted in determining the length of his vacation. 420 U. S., at 101 n. 9.

II

Alabama Power established its pension plan on July 1, 1944, during the time Davis was in the military. The plan, which is funded entirely by the company, covers all "full-time regular employee[s]" who have completed one year of continuous service with the company and are at least 25 years old. App. 58–59. Under the labor agreements and practices of the company, a full-time regular employee is one who, with limited exceptions,[12] works a 40-hour week. A covered employee has no vested right to any benefit from the plan until he has completed 20 years of service, which for this purpose includes time spent in the military, or has completed 15 years of service and attained the age of 50. *Id.*, at 90–91.[13] Normal retirement age under the plan is 65, but an employee with 20 years of "accredited service" can elect to retire any time after he has reached the age of 55. App. to Pet. for Cert. 43a–44a. Davis chose the early retirement option.

The concept of "accredited service" is a major determinant of the amount of benefits paid and is the source of the present controversy. The plan defines "accredited service" as the period of "future service" together with the period of "past service." *Id.*, at 34a–35a. These terms, in turn, are defined as an employee's period of service after the initiation of the pension plan and his inclusion within it (future service) and his period of service prior to that date (past service). *Id.*, at

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[12] The established exceptions include annual vacations, paid holidays, 10 days of annual sick leave, which may be accumulated up to a maximum of 30 days, and up to three days' leave in case of a death in the employee's immediate family. In addition, longtime employees may be allowed up to nine months of extended sick leave.

[13] The Employee Retirement Income Security Act of 1974, § 203, 88 Stat. 854, 29 U. S. C. § 1053 (1970 ed., Supp. V), establishes vesting requirements more favorable to employees than those described in the text. This law, which generally requires vesting within 10 to 15 years, did not affect respondent and, insofar as is relevant to the question presented in this case, does not alter the nature of pension plans.

35a. Future service is credited to an employee "for service rendered to the Company" as a full-time, regular employee and for periods of authorized leave of absence with pay. Employees on leave of absence without regular pay, and persons serving in the military, are not credited with future service during their absence from the company. *Id.*, at 40a.[14] Retirement benefits are calculated by the use of formulas in which years of accredited service are multiplied by an earnings factor.[15] Had Davis received accredited service for the time he spent in the military, his monthly pension payment would have been $216.06 rather than the $198.95 to which the company said he was entitled.

It is clear that the reasonable-certainty requirement of *McKinney* and *Tilton* is satisfied in this case. Respondent's work history both before and after his military tour of duty demonstrates that if he had not entered the military, he would almost certainly have accumulated accredited service for the period between March 18, 1943, and October 8, 1945. Unpredictable occurrences might have intervened, but "we cannot

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[14] A limited exception to this rule, see App. 61–62, was not applicable to Davis.

[15] Davis' pension payment is calculated under § V4 (b) (ii) of the plan. That section provides:

"The minimum Retirement Income payable after January 1, 1966 to an employee included in the Plan retiring from the service of the Company after January 1, 1966 at his Early Retirement Date (before adjustment for Provisional Payee designation, if any) shall be an amount equal to 1% of his monthly earnings on his Early Retirement Date multiplied by his years of Accredited Service, reduced by [specified amounts]." App. 70.

"Normal retirement income" under the plan is calculated by reference to specified percentages of an employee's earnings, exclusive of overtime, during his years with the company. *Id.*, at 65–68, 73. The amount to which an employee would be entitled under the "normal retirement income" formula has, however, been periodically adjusted upward by formulas which, like the formula applicable to Davis, call for multiplication of a percentage of recent earnings by the number of years of accredited service. See *id.*, at 74–84.

assume that Congress intended possibilities of this sort to defeat the veteran's seniority rights." *Tilton* v. *Missouri Pac. R. Co.*, 376 U. S., at 181.

Alabama Power contends, however, that pension payments should be viewed as compensation for service rendered, like the vacation payments in *Foster*, rather than as a perquisite of seniority like the severance payments in *Accardi*. The company argues that the definition of accredited service in terms of full-time service to the company is a bona fide, substantial work requirement which, under *Foster*, "is strong evidence that the benefit in question was intended as a form of compensation." 420 U. S., at 99. Since § 9 does not grant veterans the right to compensation for work they have not performed, Alabama Power concludes that Davis is not entitled to his claimed pension increase.

As we noted in our discussion of *Foster*, that case turned on the nature of vacation benefits, not on the particular formula by which those benefits were calculated. Even the most traditional kinds of seniority privileges could be as easily tied to a work requirement as to the more usual criterion of time as an employee. Yet, as we held in *Fishgold*, "no practice of employers . . . can cut down the service adjustment benefits which Congress has secured the veteran under the Act." 328 U. S., at 285. We must look beyond the overly simplistic analysis suggested by Alabama Power to the nature of the payments.

It is obvious that pension payments have some resemblance to compensation for work performed. Funding a pension program is a current cost of employing potential pension recipients, as are wages. The size of pension benefits is a subject of collective bargaining,[16] and future benefits may be

[16] *Inland Steel Co.* v. *NLRB*, 170 F. 2d 247 (CA7 1948), cert. denied on this issue, 336 U. S. 960 (1949), aff'd on other grounds, *Steelworkers* v. *NLRB*, 339 U. S. 382 (1950). The company contends that *Inland Steel* holds that pensions are "wages" and that they must therefore be classified

traded off against current compensation.[17] The same observations, however, can be made about any benefit and therefore are of little assistance in determining whether a particular benefit recompenses labor or rewards longevity with an employer.

Other aspects of pension plans like the one established by petitioner[18] suggest that the "true nature" of the pension payment is a reward for length of service. The most significant factor pointing to this conclusion is the lengthy period required for pension rights to vest in the employee. It is difficult to maintain that a pension increment is deferred compensation for a year of actual service when it is only the passage of years in the same company's employ, and not the service rendered, that entitles the employee to that increment.

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as "other benefits," see n. 10, *supra*, under the Military Selective Service Act. *Inland Steel* concluded, however, only that pensions are a mandatory subject of collective bargaining under the National Labor Relations Act (NLRA) because they are either wages "or other conditions of employment." 170 F. 2d, at 249–255. Even if pensions are "wages" for the purposes of the NLRA, that classification would not control their treatment under the very different statute at issue in this case. Cf. *United States* v. *Embassy Restaurant*, 359 U. S. 29, 33 (1959) (payments to union welfare fund may be "wages" under NLRA but not under Bankruptcy Act).

[17] Cf. S. Slichter, J. Healy, & E. Livernash, The Impact of Collective Bargaining on Management 373 (1960) (pension plans encouraged during World War II by difficulty of obtaining general wage increases).

[18] Petitioner's plan is a "defined benefit" plan, under which the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits. The other basic type of pension is a "defined contribution" plan, under which the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide. See 29 U. S. C. §§ 1002 (34), (35) (1970 ed., Supp. V); Note, Fiduciary Standards and the Prudent Man Rule Under the Employee Retirement Income Security Act of 1974, 88 Harv. L. Rev. 960, 961–963 (1975). We intimate no views on whether defined contribution plans are to be treated differently from defined benefit plans under the Military Selective Service Act.

Moreover, because of the vesting requirement and the use of payment formulas that depend on earnings at the time of retirement, both the cost to the employer and the payment to the employee for each year of service depend directly on the length of time the employee continues to work for that employer. Periodic adjustments of the benefit formulas to account for unanticipated increases in living costs, see App. 74–84, emphasize the dissociation of payment levels from the work that Alabama Power claims the payments compensate.

The function of pension plans in the employment system also supports respondent's claim. A pension plan assures employees that by devoting a large portion of their working years to a single employer, they will achieve some financial security in their years of retirement. By rewarding lengthy service, a plan may reduce employee turnover and training costs and help an employer secure the benefits of a stable work force. See D. McGill, Fundamentals of Private Pensions 21–23 (3d ed. 1975). In addition, by providing economic security in retirement, pension plans encourage longtime employees whose working efficiency may be on the decline to retire and make way for younger workers. *Id.*, at 21–22; S. Slichter, J. Healey, & E. Livernash, The Impact of Collective Bargaining on Management 374 (1960). The relationship between pension payments and passage of time as an employee is central to both of these functions.

We conclude, therefore, that pension payments are predominantly rewards for continuous employment with the same employer. Protecting veterans from the loss of such rewards when the break in their employment resulted from their response to the country's military needs is the purpose of § 9. That purpose is fulfilled in this case by requiring Alabama Power to pay Davis the pension to which he would have been entitled by virtue of his lengthy service if he had not been called to the colors. Accordingly, the judgment below is affirmed.

It is so ordered.

SPLAWN *v.* CALIFORNIA

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 76-143. Argued March 23, 1977—Decided June 6, 1977

Petitioner, who was convicted of selling obscene film in violation of California law, contends that portions of the instructions to the jury violated his First and Fourteenth Amendment rights, claiming that the instructions (1) allowed the jury to convict him even though it might otherwise have found that the film was protected under the standards of *Miller* v. *California*, 413 U. S. 15, because the instructions permitted the jury to consider motives of commercial exploitation on the part of persons in the chain of distribution other than petitioner, and (2) violated the prohibition against *ex post facto* laws, and the fair-warning requirement of *Bouie* v. *Columbia*, 378 U. S. 347. The challenged instruction permitted the jury, in determining whether the film was utterly without redeeming social importance, to consider the circumstances of the sale and distribution, particularly whether such circumstances indicated that the film was being commercially exploited for the sake of its prurient appeal. *Held:*

1. The instruction violated no First Amendment rights of the petitioner. The circumstances of distribution of the material are relevant from the standpoint of whether public confrontation with potentially offensive aspects of the material is being forced and are "equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes." *Ginzburg* v. *United States*, 383 U. S. 463, 470. See also *Hamling* v. *United States*, 418 U. S. 87, 130. Pp. 598-599.

2. Though the section of the California Penal Code that authorized the challenged instruction was enacted after part of the conduct for which petitioner was convicted but prior to his trial, that section does not create any new substantive offense but merely declares what type of evidence may be received and considered by the jury in deciding whether the allegedly obscene material was "utterly without redeeming social importance." *People* v. *Noroff*, 67 Cal. 2d 791, 433 P. 2d 479, relied on by petitioner in support of his *ex post facto* claim, did not

disapprove of any use of evidence of pandering for its probative value on the obscenity issue but merely rejected the concept of pandering of nonobscene material as a separate crime under state law. Pp. 599–601.

3. There was no change in the interpretation of the elements of the substantive offense prohibited by California law and *Bouie, supra*, is therefore inapplicable. P. 601.

Affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined, *post*, p. 601. STEWART, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 602. STEVENS, J., filed a dissenting opinion, in which BRENNAN, STEWART, and MARSHALL, JJ., joined, *post*, p. 602.

Arthur Wells, Jr., argued the cause and filed a brief for petitioner.

William D. Stein, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Evelle J. Younger*, Attorney General, *Jack R. Winkler*, Chief Assistant Attorney General, *Edward P. O'Brien*, Assistant Attorney General, and *Alvin J. Knudson*, Deputy Attorney General.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Splawn was convicted in 1971 of the sale of two reels of obscene film, a misdemeanor violation of California Penal Code § 311.2 (West 1970). After the conviction was affirmed on appeal by the California First District Court of Appeal and the State Supreme Court denied review, this Court granted certiorari, vacated the judgment, and remanded for consideration in light of our decision in *Miller* v. *California*, 413 U. S. 15 (1973), which had set forth the standards by

**Charles H. Keating, Jr.*, and *James J. Clancy* filed a brief for Citizens for Decency Through Law, Inc., as *amicus curiae* urging affirmance.

which the constitutionality of § 311.2 was to be determined. After the State Supreme Court ruled that the statute satisfied the requirements articulated in *Miller*, see *Bloom* v. *Municipal Court*, 16 Cal. 3d 71, 545 P. 2d 229 (1976), the Court of Appeal again affirmed the conviction and the California Supreme Court denied petitioner's motion for a hearing.

We again granted certiorari, 429 U. S. 997 (1976), to consider petitioner's assorted contentions that his conviction must be reversed because portions of the instructions given to the jury during his trial render his conviction violative of the First and Fourteenth Amendments. He claims that the instruction allowed the jury to convict him even though it might otherwise have found the material in question to have been protected under the *Miller* standards. He also contends that the same portions of the instructions render his conviction invalid by reason of the constitutional prohibition against *ex post facto* laws and the requirement of fair warning in the construction of a criminal statute enunciated in *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964). We consider these contentions in light of the fact that petitioner has abandoned any claim that the material for the selling of which he was convicted could not be found to be obscene consistently with the First and Fourteenth Amendments, and any claim that the California statute under which he was convicted does not satisfy the requirements articulated in *Miller*, *supra*.

As it was understood by the California Court of Appeal, petitioner's challenge is leveled against the following portion of the instructions:

> "In determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of sale and distribution, and particularly whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the nature of

the matter and can justify the conclusion that the matter is utterly without redeeming social importance. The weight, if any, such evidence is entitled [to] is a matter for you, the Jury, to determine.

. . . . .

"Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter is utterly without redeeming social importance." App. 38–39.

There is no doubt that as a matter of First Amendment obscenity law, evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene. *Hamling* v. *United States*, 418 U. S. 87, 130 (1974); *Ginzburg* v. *United States*, 383 U. S. 463, 470 (1966). This is so partly because, as the Court has pointed out before, the fact that the accused made such an appeal has a bearing on the ultimate constitutional tests for obscenity:

"The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether

it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes." *Ibid.*

Petitioner's interpretation of the challenged portions of the instructions in his case is that they permitted the jury to consider motives of commercial exploitation on the part of persons in the chain of distribution of the material other than himself. We upheld a similar instruction in *Hamling, supra,* however, wherein the jury was told that it could consider "whether the materials had been pandered, by looking to their '[m]anner of distribution, circumstances of production, sale, . . . advertising . . . [, and] editorial intent . . . .' This instruction was given with respect to both the Illustrated Report and the brochure which advertised it, both of which were at issue in the trial." 418 U. S., at 130.

Both *Hamling* and *Ginzburg* were prosecutions under federal obscenity statutes in federal courts, where our authority to review jury instructions is a good deal broader than is our power to upset state-court convictions by reason of instructions given during the course of a trial. See *Cupp* v. *Naughten,* 414 U. S. 141 (1973); *Henderson* v. *Kibbe, ante,* p. 145. We can exercise the latter authority only if the instruction renders the subsequent conviction violative of the United States Constitution. Questions of what categories of evidence may be admissible and probative are otherwise for the courts of the States to decide. We think *Hamling, supra,* and *Ginzburg, supra,* rather clearly show that the instruction in question abridges no rights of petitioner under the First Amendment as made applicable to the States by the Fourteenth Amendment.

But petitioner contends that even though this be so, the particular portions of the instructions of which he complains were given pursuant to a statute enacted *after* the conduct for which he was prosecuted. In his view, therefore, his conviction both violates the constitutional prohibition against *ex post facto* laws, see *Calder* v. *Bull,* 3 Dall. 386, 390 (1798),

and failed to give him constitutionally fair warning of the prohibited conduct with which he was charged. *Bouie* v. *Columbia*, *supra*. We find these contentions to be without merit, and we reject them.

The section of the California Penal Code defining the substantive misdemeanor with which petitioner was convicted, § 311.2, was in full force and effect at all times relevant to petitioner's conduct. California Penal Code § 311 (a) (West 1970), which authorized the above-quoted instructions, was enacted after part of the conduct for which he was convicted but prior to his trial. That section, however, does not create any new substantive offense, but merely declares what type of evidence may be received and considered in deciding whether the matter in question was "utterly without redeeming social importance."

Petitioner's *ex post facto* argument is based on his reading of an earlier decision of the Supreme Court of California, *People* v. *Noroff*, 67 Cal. 2d 791, 433 P. 2d 479 (1967). His view is that under that case evidence such as was admitted here would not have been admissible at his trial on the substantive offense but for the enactment of § 311 (a)(2). He claims that such a change in procedural rules governing his trial amounts to the enactment of an *ex post facto* law in violation of Art. I, § 9, cl. 3. The California Court of Appeal's opinion in this case rejected that contention, and since it is a contention which must in the last analysis turn on a proper reading of the California decisions, such a determination by the California Court of Appeal is entitled to great weight in evaluating petitioner's constitutional contentions.

The Court of Appeal, commenting on *Noroff*, said with respect to the California Supreme Court's decision in that case:

> "The court did not, however, disapprove of any use of evidence of pandering for its probative value on the issue of whether the material was obscene. It merely rejected

the concept of pandering of nonobscene material as a separate crime under the existing laws of California." App. to Pet. for Cert. ix.

We accept this conclusion of the California Court of Appeal, and therefore find it unnecessary to determine whether if § 311 (a)(2) had permitted the introduction of evidence which would have been previously excluded under California law, petitioner would have had a tenable claim under the *Ex Post Facto* Clause of the United States Constitution.

Bouie v. *City of Columbia, supra,* holds that the elements of a statutory offense may not be so changed by judicial interpretation as to deny to accused defendants fair warning of the crime prohibited. No such change in the interpretation of the elements of the substantive offense prohibited by California law took place here, and petitioner may therefore derive no benefit from *Bouie.*

We thus find no merit in petitioner's claims based on First and Fourteenth Amendment protection of nonobscene matter, the constitutional prohibition against *ex post facto* laws, or *Bouie* v. *City of Columbia.* We have considered petitioner's other claims, which appear to be variations on the same theme, and likewise reject them. The judgment of the California Court of Appeal is

Affirmed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

The California courts, in response to our remand for reconsideration in light of *Miller* v. *California,* 413 U. S. 15 (1973), reaffirmed petitioner's 1971 conviction of selling obscene films in violation of California Penal Code § 311.2 (West 1970). I would reverse the conviction. I adhere to my view expressed in *Miller* that this statute is "unconstitutionally overbroad, and therefore invalid on its face." 413 U. S., at 47 (BRENNAN, J., dissenting). See also *Pendleton* v. *California,* 423 U. S.

1068 (1976) (BRENNAN, J., dissenting from dismissal of appeal); *Sandquist* v. *California*, 423 U. S. 900, 901 (1975) (BRENNAN, J., dissenting from denial of certiorari); *Tobalina* v. *California*, 419 U. S. 926 (1974) (BRENNAN, J., dissenting from denial of certiorari); *Kaplan* v. *California*, 419 U. S. 915 (1974) (BRENNAN, J., dissenting from denial of certiorari); *Blank* v. *California*, 419 U. S. 913 (1974) (BRENNAN, J., dissenting from denial of certiorari).

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

In my view the statute under which the petitioner was convicted is constitutionally invalid on its face. Accordingly, I have joined MR. JUSTICE BRENNAN's dissent.

But even if, as the Court believes, the statute itself is not invalid, MR. JUSTICE STEVENS has surely demonstrated that this petitioner was unconstitutionally convicted under it. On that basis, I also join the dissenting opinion of MR. JUSTICE STEVENS.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join, dissenting.

Under the trial court's instructions, the jury may have determined that the films sold by the petitioner had some social significance and therefore were not in themselves obscene, but nevertheless found him guilty because they were advertised and sold as "sexually provocative." [1] A conviction pursuant to such an instruction should not be allowed to stand.

Truthful statements which are neither misleading nor offensive are protected by the First Amendment even though

[1] The relevant instruction is quoted by the Court, *ante*, at 597–598. I would emphasize this sentence: "If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter is utterly without redeeming social importance."

made for a commercial purpose. *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U. S. 748. Nothing said on petitioner's behalf in connection with the marketing of these films was false, misleading, or even arguably offensive either to the person who bought them or to an average member of the community. The statements did make it clear that the films were "sexually provocative," but that is hardly a confession that they were obscene. And, if they were not otherwise obscene, I cannot understand how these films lost their protected status by being truthfully described.[2]

Even if the social importance of the films themselves is dubious, there is a definite social interest in permitting them to be accurately described. Only an accurate description can enable a potential viewer to decide whether or not he wants

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[2] *Ginzburg* v. *United States*, 383 U. S. 463, does not foreclose this analysis because it was decided before the Court extended First Amendment coverage to commercial speech. *Ginzburg* cannot survive *Virginia Pharmacy*. *Ginzburg* is based on the premise that advertising the character of the material may "catch the salaciously disposed," 383 U. S., at 472, and "stimulat[e] the reader to accept them as prurient," *id.*, at 470. But MR. JUSTICE BLACKMUN's opinion for the Court in *Virginia Pharmacy* makes it clear:

"There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." 425 U. S., at 770. See also *Linmark Associates, Inc.* v. *Willingboro*, *ante*, p. 85. Indeed, the case for First Amendment protection in advertising is stronger in this case than in *Linmark* or *Virginia Pharmacy*. For to ban advertising of a book or film is to suppress the book or film itself.

MR. JUSTICE BRENNAN does not join this footnote. Because he agrees that the California Legislature's retroactive adoption of *Ginzburg* violates the *Ex Post Facto* Clause, n. 4, infra, we need not in his view decide the question whether *Ginzburg* survives *Virginia Pharmacy*.

to see them. Signs which identify the "adult" character of a motion picture theater or of a bookstore convey the message that sexually provocative entertainment is to be found within; under the jury instructions which the Court today finds acceptable, these signs may deprive otherwise nonobscene matter of its constitutional protection. Such signs, however, also provide a warning to those who find erotic materials offensive that they should shop elsewhere for other kinds of books, magazines, or entertainment. Under any sensible regulatory scheme, truthful description of subject matter that is pleasing to some and offensive to others ought to be encouraged, not punished.[3]

I would not send Mr. Splawn to jail for telling the truth about his shabby business.[4]

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[3] It is ironic that in upholding obscenity laws this Court has stressed the State's "legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." *Miller* v. *California*, 413 U. S. 15, 18–19 (footnote omitted).

[4] I must also record my dissent from the Court's disposition of petitioner's *ex post facto* argument.

In *People* v. *Noroff*, 58 Cal. Rptr. 172 (1967), the California Court of Appeal reversed a trial judge who had determined the obscenity issue before trial solely on the basis of the materials themselves. Relying on *Ginzburg*, the Court of Appeal held that the prosecution should have been allowed to present evidence of pandering; "although the ultimate constitutional fact in issue remains a question of law to be decided by the court, it will be a rare case . . . when a trial court may properly undertake to determine this issue prior to trial by a mere examination of the material itself unaided by expert testimony or evidence relating to the conduct of defendant in connection with the material." 58 Cal. Rptr., at 177.

The California Supreme Court reversed, and rejected the argument "that the trial court should have permitted the prosecution to go to the jury with evidence bearing upon the defendant's 'pandering' of the magazine in question." 67 Cal. 2d 791, 793, 433 P. 2d 479, 480 (1967). The court also expressly rejected an argument that an earlier California case had

adopted "a 'pandering' concept similar to that elaborated in *Ginzburg* in the context of the federal obscenity statute." *Id.*, at 793 n. 4, 433 P. 2d, at 480 n. 4.

After petitioner's offense, the California Legislature retroactively adopted *Ginzburg* by statute. In my view, petitioner had the right to rely on the *Noroff* decision, and to believe that he was entitled to truthfully advertise otherwise nonobscene material. The *Ex Post Facto* Clause "reflect[s] the strong belief of the Framers of the Constitution that men should not have to act at their peril, fearing always that the State might change its mind and alter the legal consequences of their past acts so as to take away their lives, their liberty or their property." *El Paso* v. *Simmons*, 379 U. S. 497, 522 (Black, J., dissenting).

UNITED STATES *v.* RAMSEY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76–167. Argued March 30, 1977—Decided June 6, 1977

Title 19 U. S. C. § 482 and implementing postal regulations authorize customs officials to inspect incoming international mail when they have a "reasonable cause to suspect" that the mail contains illegally imported merchandise, although the regulations prohibit the reading of correspondence absent a search warrant. Acting pursuant to the statute and regulations, a customs inspector, based on the facts that certain incoming letter-sized airmail envelopes were from Thailand, a known source of narcotics, and were bulky and much heavier than a normal airmail letter, opened the envelopes for inspection at the General Post Office in New York City, considered a "border" for border-search purposes, and ultimately the envelopes were found to contain heroin. Respondents were subsequently indicted for and convicted of narcotics offenses, the District Court having denied their motion to suppress the heroin. The Court of Appeals reversed, holding that the border-search exception to the Fourth Amendment's warrant requirement applicable to persons, baggage, and mailed packages did not apply to the opening of international mail, and that the Constitution requires that before such mail is opened a showing of probable cause must be made and a warrant obtained. *Held:*

1. Under the circumstances, the customs inspector had "reasonable cause to suspect" that there was merchandise or contraband in the envelopes, and therefore the search was plainly authorized by the statute. Pp. 611–616.

2. The Fourth Amendment does not interdict the actions taken by the inspector in opening and searching the envelopes. Pp. 616–625.

(a) Border searches without probable cause and without a warrant are nonetheless "reasonable" within the meaning of the Fourth Amendment. Pp. 616–619.

(b) The inclusion of international mail within the border-search exception does not represent any "extension" of that exception. The exception is grounded in the recognized right of the sovereign to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country, and no different constitutional standards should apply simply because the envelopes were mailed, not carried—the

critical fact being that the envelopes cross the border and enter the country, not that they are brought in by one mode of transportation rather than another. It is their entry into the country from without it that makes a resulting search "reasonable." Pp. 619–621.

(c) The border-search exception is not based on the doctrine of "exigent circumstances," but is a longstanding, historically recognized exception to the Fourth Amendment's general principle that a warrant be obtained. Pp. 621–622.

(d) The opening of international mail under the guidelines of the statute only when the customs official has reason to believe the mail contains other than correspondence, while the reading of any correspondence inside the envelopes is forbidden by the regulations, does not impermissibly chill the exercise of free speech under the First Amendment, and any "chill" that might exist under such circumstances is not only "minimal" but is also wholly subjective. Pp. 623–624.

176 U. S. App. D. C. 67, 538 F. 2d 415, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and BLACKMUN, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 625. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 625.

Kenneth S. Geller argued the cause for the United States. On the brief were *Solicitor General Bork*, *Assistant Attorney General Thornburgh*, and *Jerome M. Feit*.

Allan M. Palmer argued the cause and filed a brief for respondent Ramsey. *Irving R. M. Panzer*, by appointment of the Court, 429 U. S. 916, argued the cause and filed a brief for respondent Kelly.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Customs officials, acting with "reasonable cause to suspect" a violation of customs laws, opened for inspection incoming international letter-class mail without first obtaining a search warrant. A divided Court of Appeals for the District of Co-

Melvin L. Wulf, *Joel M. Gora*, and *Jack D. Novik* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

lumbia Circuit held, contrary to every other Court of Appeals which has considered the matter,[1] that the Fourth Amendment forbade the opening of such mail without probable cause and a search warrant. 176 U. S. App. D. C. 67, 538 F. 2d 415. We granted the Government's petition for certiorari to resolve this Circuit conflict. 429 U. S. 815. We now reverse.

I

Charles W. Ramsey and James W. Kelly jointly commenced a heroin-by-mail enterprise in the Washington, D. C., area. The process involved their procuring of heroin, which was mailed in letters from Bangkok, Thailand, and sent to various locations in the District of Columbia area for collection. Two of their suppliers, Sylvia Bailey and William Ward, who were located in West Germany, were engaged in international narcotics trafficking during the latter part of 1973 and the early part of 1974. West German agents, pursuant to court-authorized electronic surveillance, intercepted several trans-Atlantic conversations between Bailey and Ramsey during which their narcotics operation was discussed. By late January 1974, Bailey and Ward had gone to Thailand. Thai

[1] Several Courts of Appeals have held that international letter-class mail may be opened, pursuant to a border search, without probable cause and without a warrant. *United States* v. *Milroy*, 538 F. 2d 1033 (CA4), cert. denied, 426 U. S. 924 (1976); *United States* v. *King*, 517 F. 2d 350 (CA5 1975); *United States* v. *Barclift*, 514 F. 2d 1073 (CA9), cert. denied, 423 U. S. 842 (1975); *United States* v. *Bolin*, 514 F. 2d 554 (CA7 1975); *United States* v. *Odland*, 502 F. 2d 148 (CA7), cert. denied, 419 U. S. 1088 (1974). Several other Courts of Appeals, in approving the warrantless opening of mailed packages crossing the borders, have indicated that the opening of international letter-class mail should be governed by the same standards. *United States* v. *Doe*, 472 F. 2d 982 (CA2), cert. denied, *sub nom. Rodriguez* v. *United States*, 411 U. S. 969 (1973); *United States* v. *Beckley*, 335 F. 2d 86 (CA6 1964), cert. denied, *sub nom. Stone* v. *United States*, 380 U. S. 922 (1965). The First Circuit has reserved the question of letters. *United States* v. *Emery*, 541 F. 2d 887, 888–889 (1976).

officials, alerted to their presence by West German authorities, placed them under surveillance. Ward was observed mailing letter-sized envelopes in six different mail boxes; five of these envelopes were recovered; and one of the addresses in Washington, D. C., was later linked to respondents. Bailey and Ward were arrested by Thai officials on February 2, 1974; among the items seized were eleven heroin-filled envelopes addressed to the Washington, D. C., area, and later connected with respondents.

Two days after this arrest of Bailey and Ward, Inspector George Kallnischkies, a United States customs officer in New York City, without any knowledge of the foregoing events, inspecting a sack of incoming international mail from Thailand, spotted eight envelopes that were bulky and which he believed might contain merchandise.[2] The envelopes, all of which appeared to him to have been typed on the same typewriter, were addressed to four different locations in the Washington, D. C., area. Inspector Kallnischkies, based on the fact that the letters were from Thailand, a known source of narcotics, and were "rather bulky," suspected that the envelopes might contain merchandise or contraband rather than correspondence. He took the letters to an examining area in the post office, and felt one of the letters: It "felt like there was something in there, in the envelope. It was not just plain paper that the envelope is supposed to contain." He weighed one of the envelopes, and found it weighed 42 grams, some three to six times the normal weight of an airmail letter. Inspector Kallnischkies then opened that envelope: [3]

> "In there I saw some cardboard and between the cardboard, if I recall, there was a plastic bag containing a

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[2] The mail was inspected at the General Post Office in New York City, where incoming international air mail landing at Kennedy Airport is taken for routing and customs inspections. There is no dispute that this is the "border" for purposes of border searches, see n. 11, *infra*.

[3] Inspector Kallnischkies also testified that his "normal procedure," when

white powdered substance, which, based on experience, I knew from Thailand would be heroin.

"I went ahead and removed a sample. Gave it a field test, a Marquis Reagent field test, and I had a positive reaction for heroin." App. 32.

He proceeded to open the other seven envelopes which "in a lot of ways were identical"; examination revealed that at least the contents were in fact identical: each contained heroin.

The envelopes were then sent to Washington in a locked pouch where agents of the Drug Enforcement Administration, after obtaining a search warrant, opened the envelopes again and removed most of the heroin.[4] The envelopes were then resealed, and six of them were delivered under surveillance. After Kelly collected the envelopes from the three different addressees, rendezvoused with Ramsey, and gave Ramsey a brown paper bag, federal agents arrested both of them. The bag contained the six envelopes with heroin, $1,100 in cash, and "cutting" material for the heroin. The next day, in executing a search upon warrant of Ramsey's residence, agents recovered, *inter alia*, two pistols.

Ramsey and Kelly were indicted, along with Bailey and Ward, in a 17-count indictment.[5] Respondents moved to

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examining envelopes from certain countries which were of a certain weight and bulkiness, was to "shake it a little," and "if it moves, I know there is something in there that is not correspondence. It is merchandise and I have to open it to check it out." App. 48–49. He was unable to specifically recall, however, whether or not he had followed the "normal procedure" in this case.

[4] The Government does not seek to justify the original discovery of the heroin on the basis of this warrant: "[A] post-opening warrant obviously does not justify the original opening." Brief for United States 4 n. 2. We accordingly accord no significance to the obtaining of this subsequent warrant.

[5] Bailey and Ward, although indicted, were not tried, as they have remained outside the United States.

suppress the heroin and the two pistols.[6] The District Court denied the motions, and after a bench trial on the stipulated record, respondents were found guilty and sentenced to imprisonment for what is in effect a term of 10 to 30 years. The Court of Appeals for the District of Columbia Circuit, one judge dissenting, reversed the convictions, holding that the "border search exception to the warrant requirement" applicable to persons, baggage, and mailed packages did not apply to the routine opening of international letter mail, and held that the Constitution requires that "before international letter mail is opened, a showing of probable cause be made to and a warrant secured from a neutral magistrate." 176 U. S. App. D. C., at 73, 538 F. 2d, at 421.[7]

II

Congress and the applicable postal regulations authorized the actions undertaken in this case. Title 19 U. S. C. § 482, a recodification of Rev. Stat. § 3061, and derived from § 3 of the Act of July 18, 1866, 14 Stat. 178, explicitly deals with the search of an "envelope":

> "Any of the officers or persons authorized to board or search vessels may . . . search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law . . . ."

This provision authorizes customs officials to inspect, under

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[6] The Government acknowledges that "[t]he weapons were found as a result of respondents' arrests and so are 'fruit' of the discovery of the heroin. The convictions consequently must stand or fall with the heroin offenses." *Id.*, at 5 n. 4.

[7] Neither court below considered whether Ramsey or Kelly had standing to object to the opening of the envelopes in light of the fact that none of the envelopes were addressed to them. The Government, however, did not raise the issue below, and consequently we do not reach it. *United States* v. *Santana*, 427 U. S. 38, 41 n. 2 (1976).

the circumstances therein stated, incoming international mail.[8] The "reasonable cause to suspect" test adopted by the statute is, we think, a practical test which imposes a less stringent

[8] Postal regulations have implemented this authority. See 19 CFR § 145.2 (1976); 39 CFR § 61.1 (1975). The regulations were promulgated in 1971; prior to that time existing regulations did not implement the statutory authority. The fact that postal authorities did not open incoming international letter-class mail upon "reasonable cause to suspect" prior to 1971 does not change our analysis.

Title 39 U. S. C. § 3623 (d), which prohibits the opening of first-class mail of "domestic origin," "except under authority of a search warrant authorized by law . . . ," has, by its own terms, no application to international mail of any class. A proposed amendment, which would have imposed similar statutory requirements on the opening of international mail, was defeated on the floor of the House, 116 Cong. Rec. 20482–20483 (1970).

Our dissenting Brethren find no fewer than five separate reasons for refusing to follow the unambiguous language of the statutory section. The first is the longstanding respect Congress has shown for "the individual's interest in private communication." *Post*, at 626. But as we examine it, *infra*, at 616–619, no such support may be garnered from the history of the Fourth Amendment insofar as border searches are concerned. Insofar as they rely on the First Amendment, they ignore the limitations imposed on the search by the statute, *infra*, at 623–624, as well as by the regulations. Postulating a sensitive concern for First Amendment values as of 1866 is a difficult historical exercise on the basis of available materials from that time. Cf. *Ex parte Jackson*, 96 U. S. 727 (1878) (Fourth Amendment analysis only). Most puzzling of all, however, is the dissent's reliance on the defeated amendment, offered in 1970, when there is no dearth of available materials, which would have imposed a specific warrant requirement on the opening of international letter-class mail. Contrary to the tenor of the dissent, the amendment was defeated, not passed. The one bit of legislative history the dissent quotes, a statement of Congressman Derwinski, reflects only the concern that with the amendment " 'the problem of stopping the flow of narcotics and pornography would be greatly compounded.' " *Post*, at 626 n. 2. We do not see how any solace whatever for the dissenting position may be derived from this sort of legislative history.

The dissent also relies on a brief colloquy on the floor of the Senate during the debate on the 1866 Act. The colloquy is notable both for its brevity and for its ambiguity. It does not distinguish between

requirement than that of "probable cause" imposed by the Fourth Amendment as a requirement for the issuance of warrants. See *United States* v. *King*, 517 F. 2d 350, 352

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mailed packages and mailed letters; it refers generally to the " 'examination of . . . the United States mails.' " *Post*, at 627. Yet, by that time, the "mail" encompassed both. See 12 Stat. 704. (To the extent the colloquy was meant to encompass *any* intrusion on the "mails," the statute has long since been interpreted otherwise. *Cotzhausen* v. *Nazro*, 107 U. S. 215, 219 (1883).) Perhaps because of its brevity, the colloquy does not distinguish between domestic and international mail, nor does it distinguish between the searching of envelopes for contraband and the possible reading of enclosed communications. It explicitly manifests a concern with § 2 as well as with § 3 of the bill. But § 2 allowed customs inspectors "to go on board of any vessel . . . and to inspect, search, and examine the same, and any person, trunk, or envelope on board . . . ." Section 3, however, contains a "reasonable cause to suspect" requirement that is not found in § 2, and the colloquy may have simply referred to a concern about the wholesale opening, and reading, of letters. Cf. Cong. Globe 39th Cong., 1st Sess., 3440–3441 (1866). The colloquy by no means indicates to us that Congress was concerned only with detecting smuggling that would be carried in "trunk"-sized packages. It is at best insufficient to overcome the precise and clear statutory language Congress actually enacted.

The dissent additionally relies on the language of the statute in its entirety as demonstrating a concern only with "packages of the kind normally used to import dutiable merchandise." *Post*, at 628. But this assertion—assuming we as judges know what size packages dutiable merchandise *usually* comes in—is wholly contrary to the thrust of the purpose, and the language, of the Act. The purpose of the Act is "to Prevent Smuggling." Nowhere does this purpose, however and wherever articulated, reflect a concern with the physical size of the container employed in smuggling, nor do we possess any reliable indication that only large items were smuggled into this country in 1866. As for the word "envelope," it is difficult to see how our dissenting Brethren derive comfort from its use in the statute. The contemporary dictionary source they cite states that the most common use of the word "envelope" is in the sense of " 'the cover or wrapper of a document, as of a letter.' " *Post*, at 630 n. 5. We are quite unable to see how this, the most common usage of the word, reinforces the view that Congress intended only a narrow definition when it used the word without restriction.

The dissent also relies on a "consistent construction" over 105

(CA5 1975); cf. *Terry* v. *Ohio*, 392 U. S. 1, 8, 21–22, 27 (1968). Inspector Kallnischkies, at the time he opened the letters, knew that they were from Thailand, were bulky, were many times the weight of a normal airmail letter, and "felt like there was something in there." Under these circumstances, we have no doubt that he had reasonable "cause to suspect" that there was merchandise or contraband in the envelopes.[9]

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years by the Executive. *Post*, at 631. To the extent it relies on a construction that things entering by mail are not covered by the statute, this reliance founders on the opinion of a former Acting Attorney General. See 18 Op. Atty. Gen. 457 (1886). To the extent it is referring only to letter-sized mail, the dissent nowhere demonstrates *any* actual interpretation by anyone that the congressional authority was perceived as an affirmative limitation on the power of the Executive to open letters at the border when there existed "reasonable cause" to suspect a violation of customs laws. The evidence marshaled by our dissenting Brethren on this point could be called "consistent" only by the most generous appraiser of such material.

The dissent's final reliance is on the assertion that asking the addressee for consent to open a letter had not been proved unworkable. Presumably the conclusion to be drawn from this is that the Executive's reason for a change in its policy is weak. But this is beside the point; it reflects not at all on Congress' words or intent in 1866 or at any other time. That the Executive Branch may have relied on a less-than-cogent reason in its 1971 regulatory change has nothing to do with the interpretation of an Act of Congress.

Underlying all of these reasons, apparently, is the fear that "[i]f the Government is allowed to exercise the power it claims, the door will be open to the wholesale, secret examination of all incoming international letter mail." *Post*, at 632. That specter is simply not presented by this case. As we observe, *infra*, at 623–624, the opening of mail is limited by a "reasonable cause" requirement, while the reading of letters is totally interdicted by regulation. It is this unwarranted speculation, and not the policy followed by the Executive, that poses the "serious constitutional question" to be avoided.

[9] The Court of Appeals, it should be noted, evidently believed that Inspector Kallnischkies possessed sufficient information at the time the envelopes were opened to meet the stricter "probable cause" requirement;

The search, therefore, was plainly authorized by the statute.[10]

Since the search in this case was authorized by statute, we are left simply with the question of whether the search, nevertheless violated the Constitution. Cf. *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 877 (1975). Specifically, we need not decide whether Congress conceived the statute as a necessary precondition to the validity of the search or whether it was viewed, instead, as a limitation on otherwise existing authority of the Executive.[11] Having acted pursuant to, and

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it believed "that the facts in this case are such that, had they been presented to a magistrate, issuance of a search warrant permitting opening of the envelopes would have been appropriate." 176 U. S. App. D. C. 67, 73 n. 8, 538 F. 2d 415, 421 n. 8. Because of our disposition of this case, we do not reach that question.

[10] In light of our conclusion that there existed "reasonable cause to suspect" a violation of the customs laws, we need not, and do not, decide whether the search would have nonetheless been authorized by other statutory grants of authority urged alternatively upon us by the Government. Title 19 U. S. C. § 482 also authorizes customs officials to "stop, search, and examine . . . any vehicle, beast, or person, on which or whom . . . they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise . . . ." Title 19 U. S. C. § 1582 provides, in pertinent part, that "[t]he Secretary of the Treasury may prescribe regulations for the search of persons and baggage . . . ; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations."

[11] Although the statutory authority authorizes searches of envelopes "wherever found," 19 U. S. C. § 482, the envelopes were searched at the New York City Post Office as the mail was entering the United States. We, therefore, do not have before us the question, recently addressed in other contexts, of the geographical limits to border searches. See *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975); *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973). Nor do we need to decide whether the broad statutory authority subjects such mail to customs inspection at a place other than the point of entry into this country. See *United States* v. *King*, 517 F. 2d, at 354 ("[T]he envelopes had passed

within the scope of, a congressional Act, Inspector Kallnischkies' searches were permissible unless they violated the Constitution.

III

A

That searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration. The Congress which proposed the Bill of Rights, including the Fourth Amendment, to the state legislatures on September 25, 1789, 1 Stat. 97, had, some two months prior to that proposal, enacted the first customs statute, Act of July 31, 1789, c. 5, 1 Stat. 29. Section 24 of this statute granted customs officials "full power and authority" to enter and search "any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed . . . ." This acknowledgment of plenary customs power was differentiated from the more limited power to enter and search "any particular dwelling-house, store, building, or other place . . ." where a warrant upon "cause to suspect" was required.[12] The historical importance of the

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an initial stage in the customs process when they were routed to Alabama, but they were still in the process of being delivered, and still subject to customs inspection").

[12] Section 23 of this customs statute provided, in pertinent part:

"[I]t shall be lawful for the collector, or other officer of the customs, after entry made of any goods, wares or merchandise, on suspicion of fraud, to open and examine, in the presence of two or more reputable merchants, any package or packages thereof . . . ."

Section 24 of this customs statute provided, in pertinent part:

"[E]very collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have

enactment of this customs statute by the same Congress which proposed the Fourth Amendment is, we think, manifest. This Court so concluded almost a century ago. In *Boyd* v. *United States*, 116 U. S. 616, 623 (1886), this Court observed:

> "The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duties, the act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. *As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment.*" (Emphasis supplied.)

This interpretation, that border searches were not subject to the warrant provisions of the Fourth Amendment and were "reasonable" within the meaning of that Amendment, has been faithfully adhered to by this Court. *Carroll* v. *United States*, 267 U. S. 132 (1925), after noting that "[t]he Fourth Amend-

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reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial . . . ."

ment does not denounce all searches or seizures, but only such as are unreasonable," *id.*, at 147, recognized the distinction between searches within this country, requiring probable cause, and border searches, *id.*, at 153–154:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. *Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.* But those lawfully within the country . . . have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." [13] (Emphasis supplied.)

More recently, we noted this longstanding history in *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 376 (1971):

> "But a port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search. Customs officials characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country."

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[13] We do not decide whether, and under what circumstances, a border search might be deemed "unreasonable" because of the particularly offensive manner in which it is carried out. Cf. *Kremen* v. *United States*, 353 U. S. 346 (1957); *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 356–358 (1931)

In *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123, 125 (1973), we observed: "Import restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations. The Constitution gives Congress broad, comprehensive powers '[t]o regulate Commerce with foreign Nations.' Art. I, § 8, cl. 3. Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry." Finally, citing *Carroll* and *Boyd*, this Court stated in *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 272 (1973), that it was "without doubt" that the power to exclude aliens "can be effectuated by routine inspections and searches of individuals or conveyances seeking to cross our borders." See also *id.*, at 288 (WHITE, J., dissenting).

Border searches, then, from before the adoption of the Fourth Amendment, have been considered to be "reasonable" by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless "reasonable" has a history as old as the Fourth Amendment itself.[14] We reaffirm it now.

B

Respondents urge upon us, however, the position that mailed letters are somehow different, and, whatever may be the normal rule with respect to border searches, different considerations, requiring the full panoply of Fourth Amend-

[14] The opinion in *Carroll* v. *United States*, 267 U. S. 132, 149 (1925), itself reminds us that "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."

ment protections, apply to international mail. The Court of Appeals agreed, and felt that whatever the rule may be with respect to travelers, their baggage, and even mailed packages, it would not "extend" the border-search exception to include mailed letter-size envelopes. 176 U. S. App. D. C., at 73, 538 F. 2d, at 421. We do not agree that this inclusion of letters within the border-search exception represents any "extension" of that exception.

The border-search exception is grounded in the recognized right of the sovereign to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country. It is clear that there is nothing in the rationale behind the border-search exception which suggests that the mode of entry will be critical. It was conceded at oral argument that customs officials could search, without probable cause and without a warrant, envelopes carried by an entering traveler, whether in his luggage or on his person. Tr. of Oral Arg. 43–44. Surely no different constitutional standard should apply simply because the envelopes were mailed, not carried. The critical fact is that the envelopes cross the border and enter this country, not that they are brought in by one mode of transportation rather than another. It is their entry into this country from without it that makes a resulting search "reasonable."

Almost a century ago this Court rejected such a distinction in construing a protocol to the Treaty of Berne, 19 Stat. 604, which prohibited the importation of letters which might contain dutiable items. *Cotzhausen* v. *Nazro*, 107 U. S. 215 (1883). Condemning the unsoundness of any distinction between entry by mail and entry by other means, Mr. Justice Miller, on behalf of a unanimous Court, wrote, *id.*, at 218:

> "Of what avail would it be that every passenger, citizen and foreigner, without distinction of country or sex, is compelled to sign a declaration before landing, either

> that his trunks and satchels in hand contain nothing liable to duty, or if they do, to state what it is, and even the person may be subjected to a rigid examination, if the mail is to be left unwatched, and all its sealed contents, even after delivery to the person to whom addressed, are to be exempt from seizure, though laces, jewels, and other dutiable matter of great value may thus be introduced from foreign countries."

The historically recognized scope of the border-search doctrine, suggests no distinction in constitutional doctrine stemming from the mode of transportation across our borders. The contrary view of the Court of Appeals and respondents stems, we think, from an erroneous reading of *Carroll* v. *United States*, 267 U. S., at 153, under which the Court of Appeals reasoned that "the rationale of the border search exception . . . is based upon . . . the difficulty of obtaining a warrant when the subject of the search is mobile, as a car or person . . . ." 176 U. S. App. D. C., at 70, 538 F. 2d, at 418.[15]

The fundamental difficulty with this position is that the "border search" exception is not based on the doctrine of "exigent circumstances" at all. It is a longstanding, historically recognized exception to the Fourth Amendent's general principle that a warrant be obtained, and in this respect is like the similar "search incident to lawful arrest" exception treated in *United States* v. *Robinson*, 414 U. S. 218, 224 (1973). We think that the language in *Carroll* v. *United States*, *supra*, makes this point abundantly clear. The *Carroll* Court

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[15] This explanation does not, and cannot, fully explain the border-search "exception" even if it were grounded in the "exigent circumstances" doctrine. For a letter may as easily be held by customs officials when it crosses with a traveler as it can when it crosses in the mail. Too, this explanation cannot explain the different treatment which the Court of Appeals apparently would have accorded mailed packages, which presumably may be detained as easily as letter-size envelopes.

quoted verbatim the above-quoted language from *Boyd* v. *United States*, 116 U. S. 616 (1886), including the reference to customs searches and seizures of the kind authorized by 1 Stat. 29, 43, as being neither "unreasonable" nor "embraced within the prohibition of the [Fourth] [A]mendment." Later in the opinion, the Court commented that having "established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for *without a warrant*, we come now to consider under what circumstances such search may be made." 267 U. S., at 153 (emphasis supplied). It then, in the passage quoted *supra*, at 618, distinguished, among these types of searches which required no warrant, those which required *probable cause* from those which did not: border searches did not; vehicular searches inside the country did. *Carroll* thus recognized that there was no "probable cause" requirement at the border. This determination simply has nothing to do with "exigent circumstances."

The Court of Appeals also relied upon what it described as this Court's refusal in recent years twice "to take an expansive view of the border search exception or the authority of the Border Patrol. See *United States* v. *Brignoni-Ponce*, 422 U. S. 873 . . . (1975); *Almeida-Sanchez* v. *United States*, 413 U. S. 266 . . . (1973)." 176 U. S. App. D. C., at 72, 538 F. 2d, at 420. But, as the language from each of these opinions suggests, 422 U. S., at 876, 884; 413 U. S., at 272–273, plenary border-search authority was not implicated by our refusal to uphold searches and stops made at places in the interior of the country; the express premise for each holding was that the checkpoint or stop in question was not the border or its "functional equivalent."

In view of the wealth of authority establishing the border search as "reasonable" within the Fourth Amendment even though there be neither probable cause nor a warrant, we reject the distinctions made by the Court of Appeals in its opinion.

Nor do we agree that, under the circumstances presented by this case, First Amendment considerations dictate a full panoply of Fourth Amendment rights prior to the border search of mailed letters. There is, again, no reason to distinguish between letters mailed into the country, and letters carried on the traveler's person.[16] More fundamentally, however, the existing system of border searches has not been shown to invade protected First Amendment rights,[17] and hence there is no reason to think that the potential presence of correspondence makes the otherwise constitutionally reasonable search "unreasonable."

The statute in question requires that there be "reasonable cause to believe" the customs laws are being violated prior to the opening of envelopes. Applicable postal regulations flatly prohibit, under all circumstances, the reading of correspondence absent a search warrant, 19 CFR § 145.3 (1976):

> "No customs officer or employee shall read or authorize or allow any other person to read any correspondence contained in sealed letter mail of foreign origin unless a search warrant has been obtained in advance from an appropriate judge or U. S. magistrate which authorizes such action."

Cf. 18 U. S. C. § 1702.

We are unable to agree with the Court of Appeals that the opening of international mail in search of customs violations,

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[16] There is no reason to infer that mailed letters somehow carry with them a greater expectation of privacy than do letters carried on one's person. Cf. 39 U. S. C. § 3623 (d).

[17] There are limited justifiable expectations of privacy for incoming material crossing United States borders. Not only is there the longstanding, constitutionally authorized right of customs officials to search incoming persons and goods, but there is no statutorily created expectation of privacy. See 39 U. S. C. § 3623 (d). See also *United States* v. *King*, 517 F. 2d, at 354; *United States* v. *Odland*, 502 F. 2d 148 (CA7), cert. denied, 419 U. S. 1088 (1974); *United States* v. *Doe*, 472 F. 2d, at 985.

under the above guidelines, impermissibly chills the exercise of free speech. Accordingly, we find it unnecessary to consider the constitutional reach of the First Amendment in this area in the absence of the existing statutory and regulatory protection.[18] Here envelopes are opened at the border only when the customs officers have reason to believe they contain other than correspondence, while the reading of any correspondence inside the envelopes is forbidden. Any "chill" that might exist under these circumstances may fairly be considered not only "minimal," *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 560, 562 (1976); cf. *United States* v. *Biswell*, 406 U. S. 311, 316–317 (1972), but also wholly subjective.[19]

We therefore conclude that the Fourth Amendment does not interdict the actions taken by Inspector Kallnischkies in

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[18] We, accordingly, have no occasion to decide whether, in the absence of the regulatory restrictions, speech would be "chilled," or, if it were, whether the appropriate response would be to apply the full panoply of Fourth Amendment requirements. Cf. *Roaden* v. *Kentucky*, 413 U. S. 496, 502–506 (1973); *Terry* v. *Ohio*, 392 U. S. 1, 19 (1968); *Stanford* v. *Texas*, 379 U. S. 476, 485 (1965).

[19] In *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), this Court, in the context of the opening of mail from an attorney to a prisoner-client, noted that "freedom from censorship is not equivalent to freedom from inspection or perusal," *id.*, at 576. This Court held:

"As to the ability to open the mail in the presence of inmates, this could in no way constitute censorship, since the mail would not be read. Neither could it chill such communications, since the inmate's presence insures that prison officials will not read the mail. The possibility that contraband will be enclosed in letters, even those from apparent attorneys, surely warrants prison officials' opening the letters." *Id.*, at 577.

We deal here, of course, with borders, not prisons. Yet the power of customs officials to take plenary action to stop the entry of contraband is no less in the border-search area than in prisons. The safeguards in the border-search area, we think, are comparable to those found constitutionally valid in *Wolff*.

opening and searching the eight envelopes. The judgment of the Court of Appeals is, therefore,

Reversed.

MR. JUSTICE POWELL, concurring.

The statute at issue expressly authorizes customs officials to "search any . . . envelope" at the border where there is "reasonable cause to suspect" the importation of contraband. 19 U. S. C. § 482. In view of the necessarily enhanced power of the Federal Government to enforce customs laws at the border, I have no doubt that this statute—requiring as a precondition to the opening of mail "reasonable cause to suspect" a violation of law—adequately protects both First and Fourth Amendment rights.*

I therefore join in the judgment of the Court. On the understanding that the precedential effect of today's decision does not go beyond the validity of mail searches at the border pursuant to the statute, I also join the opinion of the Court.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The decisive question in this case is whether Congress has granted customs officials the authority to open and inspect personal letters entering the United States from abroad without the knowledge or consent of the sender or the addressee, and without probable cause to believe the mail contains contraband or dutiable merchandise.

In 1971 the Department of the Treasury and the Post Office Department first asserted that Congress had granted such authority in an awkwardly drafted statute enacted in 1866.

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*As the Court notes, *ante*, at 623, postal regulations flatly prohibit the reading of "any correspondence contained in sealed letter mail of foreign origin unless a search warrant has been obtained . . . ." 19 CFR § 145.3 (1976).

Under the earlier practice, which had been consistently followed for 105 years, customs officials were not allowed to open foreign mail except in the presence, and with the consent, of the addressees,[1] unless of course a warrant supported by probable cause had been first obtained. There are five reasons why I am convinced that Congress did not authorize the kind of secret searches of private mail that the Executive here conducted.

First, throughout our history Congress has respected the individual's interest in private communication. The notion that private letters could be opened and inspected without notice to the sender or the addressee is abhorrent to the tradition of privacy and freedom to communicate protected by the Bill of Rights. I cannot believe that any member of the Congress would grant such authority without considering its constitutional implications.[2]

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[1] This was the procedure followed by the customs officials in *Cotzhausen* v. *Nazro*, 107 U. S. 215, relied upon by the Government here. For 100 years, from 1871 to 1971, Post Office Regulations allowed incoming international letter mail to be opened only in the presence, and with the consent, of the addressee. Brief for United States 20–21, nn. 12a, 14 (citing regulations).

[2] This conviction is bolstered by the history of the defeat of the amendment which would have imposed a specific warrant requirement on the opening of international mails, *ante*, at 612 n. 8. The amendment was offered during the course of House debate on the Postal Reorganization and Salary Adjustment Act of 1970, Title 39 U. S. C., which created the United States Postal Service. This amendment was but one of more than 35 amendments to the Act offered on the floor of the House that day. 116 Cong. Rec. 20481 (1970). Speaking immediately before the amendment was defeated, Congressman Derwinski said:

"Going beyond the constitutional debate which we do not have the time for this afternoon, if this amendment were to be adopted, the problem of stopping the flow of narcotics and pornography would be greatly compounded.

"I do not believe we want to legislate on such a major issue with just 10 minutes of debate." *Id.*, at 20483.

Under such circumstances the defeat of this amendment cannot be considered an expression of the will of the House of Representatives on the

Second, the legislative history of the 1866 statute unambiguously discloses that this very concern was voiced during debate by Senator Howe, and that he was assured by the sponsor of the legislation that the bill would not authorize the examination of the United States mails. This colloquy is too plain to be misunderstood:

> "Mr. HOWE. The second and third sections of this bill speak of the seizure, search, and examination of all trunks, packages, and envelopes. It seems to me that language is broad enough to cover the United States mails. I suppose it is not the purpose of the bill to authorize the examination of the United States mails.
>
> "Mr. MORRILL [sponsor of the bill]. Of course not.
>
> "Mr. HOWE. I propose to offer an amendment to prevent such a construction.
>
> "Mr. EDMUNDS. There is no danger of such a construction being placed upon this language. It is the language usually employed in these bills.
>
> "Mr. HOWE. If gentlemen are perfectly confident that it will bear no such construction, and will receive no such construction, I do not care to press it.
>
> "The PRESIDING OFFICER. The Senator from Wisconsin withdraws his amendment." [3]

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issue, but it does emphasize the reluctance of Congress to legislate in the area without careful consideration of the constitutional questions. See, *e. g.*, 18 U. S. C. § 2510 (Omnibus Crime Control and Safe Streets Act of 1968) (warrant required to electronically intercept wire or oral communications); S. Rep. No. 1097, 90th Cong., 2d Sess., 66–76, 88–108, 161–177, 182–183, 187, 214–218, 224–226, 234–239 (1968). I do not, of course, imply that this incident is, in itself, sufficient to demonstrate congressional sensitivity to the individual interest in private communication. See *ante*, at 612 n. 8. I cannot believe, however, that the Court seriously questions the validity of my assumption that Congress (in 1866 as well as today) was indeed concerned about such matters.

[3] Cong. Globe, 39th Cong., 1st Sess., 2596 (1866). After consideration of one more amendment the bill passed the Senate the same day.

Third, the language of the statute itself, when read in its entirety, quite plainly has reference to packages of the kind normally used to import dutiable merchandise.[4] It is true

[4] The first three sections of the Act, Further to Prevent Smuggling and for Other Purposes, enacted on July 18, 1866, read as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That, for the purposes of this act, the term 'vessel,' whenever hereinafter used, shall be held to include every description of water-craft, raft, vehicle, and contrivance used or capable of being used as a means or auxiliary of transportation on or by water; and the term 'vehicle,' whenever hereinafter used, shall be held to include every description of carriage, wagon, engine, car, sleigh, sled, sledge, hurdle, cart, and other artificial contrivance, used or capable of being used as a means or auxiliary of transportation on land.

"SEC. 2. *And be it further enacted*, That it shall be lawful for any officer of the customs, including inspectors and occasional inspectors, or of a revenue cutter, or authorized agent of the Treasury Department, or other person specially appointed for the purpose in writing by a collector, naval officer, or surveyor of the customs, to go on board of any vessel, as well without as within his district, and to inspect, search, and examine the same, and any person, trunk, or envelope on board, and to this end, to hail and stop such vessel if under way, and to use all necessary force to compel compliance; and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which, such vessel, or the goods, wares, and merchandise, or any part thereof, on board of or imported by such vessel, is or are liable to forfeiture, to make seizure of the same, or either or any part thereof, and to arrest, or in case of escape, or any attempt to escape, to pursue and arrest any person engaged in such breach or violation: *Provided*, That the original appointment in writing of any person specially appointed as aforesaid shall be filed in the custom-house where such appointment is made.

"SEC. 3. *And be it further enacted*, That any of the officers or persons authorized by the second section of this act to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person on which or whom he or they shall suspect there are goods, wares, or merchandise which are subject to duty or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or

that buried deep in the first long sentence in § 3 of the Act to prevent smuggling there is an authorization to "search any trunk or envelope, wherever found." I do not believe, however, that the word "envelope" as there used was intended to refer to ordinary letters. Contemporary American diction-

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envelope, wherever found, in which he may have a reasonable cause to suspect there are goods which were imported contrary to law; and if any such officer or other person so authorized as aforesaid shall find any goods, wares, or merchandise, on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe are subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial; and every such vehicle and beast, or either, together with teams or other motive-power used in conveying, drawing, or propelling such vehicle, goods, wares, or merchandise, and all other appurtenances, including trunks, envelopes, covers, and all means of concealment, and all the equipage, trappings, and other appurtenances of such beast, team, or vehicle shall be subject to seizure and forfeiture; and if any person who may be driving or conducting, or in charge of any such carriage or vehicle or beast, or any person travelling, shall wilfully refuse to stop and allow search and examination to be made as herein provided, when required so to do by any authorized person, he or she shall, on conviction, be fined in any sum, in the discretion of the court convicting him or her, not exceeding one thousand dollars, nor less than fifty dollars; and the Secretary of the Treasury may from time to time prescribe regulations for the search of persons and baggage, and for the employment of female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the government, under such regulations as the Secretary of the Treasury shall from time to time prescribe: *Provided,* That no railway car or engine or other vehicle, or team used by any person or corporation, as common carriers in the transaction of their business as such common carriers shall be subject to forfeiture by force of the provisions of this act unless it shall appear that the owners, superintendent, or agent of the owner in charge thereof at the time of such unlawful importation or transportation thereon or thereby, was a consenting party, or privy to such illegal importation or transportation." 14 Stat. 178–179.

aries emphasize the usage of the word as descriptive of a package or wrapper as well as an ordinary letter.[5] This emphasis is consistent with the text of the bill as originally introduced, which used the phrase "any trunk, or other envelope." [6] Moreover, in 1866 when the Act was passed, there was no concern expressed in Congress about the smuggling of merchandise that would fit in a letter-size envelope.[7] A legislative decision to authorize the secret search of private mail would surely be expressed in plainer language than is found in the long statutory provision quoted in the margin; at the very least it would be supported by some affirmative evidence in the legislative history rather than the total disclaimer in the colloquy quoted above.

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[5] "A wrapper; an outward covering or case." J. Worcester, A Dictionary of the English Language (1860).

"That which envelops, wraps up, encases, or surrounds; a wrapper; a cover; especially, the cover or wrapper of a document, as of a letter." N. Webster, An American Dictionary of the English Language (Goodrich & Porter eds. 1869).

These are the primary definitions given for "envelope."

[6] The word "other" was deleted by amendment, Cong. Globe, 39th Cong., 1st Sess., 2564 (1866). I recognize that one may argue that the deletion of the word "other" is evidence of an intent to include every kind of envelope rather than just those comparable to a "trunk." It seems more reasonable to infer, however, that the draftsmen considered the direct comparison to a trunk too restrictive and merely had in mind all containers which performed the same kind of packaging function even though not as large as a trunk. It seems unrealistic to interpret this change as intended to broaden the statute to encompass personal mail.

[7] The stated object of the 1866 Act was to prevent smuggling, especially from Canada along the North and Northwestern frontier:

"It has been found very difficult on our frontier during the last two years to prevent the system of smuggling which has been going on and increasing day by day. The custom-houses are defrauded and the Government is cheated." Remarks of Congressman Eliot, Cong. Globe, 39th Cong., 1st Sess., 3419 (1866).

See also remarks of Senator Morrill, *id.*, at 2563; of Senator Williams, *id.*, at 2567.

Fourth, the consistent construction of the statutory authorization by a series of changing administrations over a span of 105 years must be accorded great respect.[8] *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 274–275; *Helvering* v. *Reynolds Co.*, 306 U. S. 110, 114–115. If the Executive perceives that new conditions and problems justify enlargement of the authority that had been found adequate for over a century, then these matters should be brought to the attention of Congress. Cf. *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 109.[9]

Finally, the asserted justification for the broad power claimed is so weak that it is difficult to believe that Congress would accept it without the most searching analysis. The fear the new practice is intended to overcome is that the addressee of a suspicious item of mail would withhold consent to open foreign mail, thereby necessitating the return of the item to the sender. But the refusal to accept delivery without disclosing the contents of a suspicious letter would itself be a fact which could be considered—along with whatever indicia caused the inspector to regard the item with suspicion in the first place—in a probable-cause determination. There is no reason to believe that the alternatives of probable cause or consent would lead to the extensive return of contraband that

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[8] An 1886 opinion of Acting Attorney General Jenks made reference to the practice followed in *Cotzhausen* v. *Nazro*, 107 U. S. 215, a case which involved the opening of package mail with the consent, and in the presence, of the addressee. See 18 Op. Atty. Gen. 457, 458. No opinion of any subsequent Attorney General has construed the statute any more broadly.

[9] In support of its argument in this Court that the 1971 regulations are reasonable within the meaning of the Fourth Amendment, the Government has assembled a plethora of statistical data obtained after the regulations were adopted. Such a *post hoc* justification cannot, of course, inform us about the actual motivation for the adoption of the regulations. I mention the point only because the Government's reliance on these data tends to confirm my judgment that if a new rule is to be fashioned, it should be drafted by the Congress.

would otherwise be confiscated on the basis of "reasonable cause to suspect."

If the Government is allowed to exercise the power it claims, the door will be open to the wholesale, secret examination of all incoming international letter mail. No notice would be necessary either before or after the search. Until Congress has made an unambiguous policy decision that such an unprecedented intrusion upon a vital method of personal communication is in the Nation's interest, this Court should not address the serious constitutional question it decides today. For it is settled that

> "when action taken by an inferior governmental agency was accomplished by procedures which raise serious constitutional questions, an initial inquiry will be made to determine whether or not 'the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use.' [*Greene* v. *McElroy*, 360 U. S. 474,] 507." *Hannah* v. *Larche*, 363 U. S. 420, 430.

Cf. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 347–348 (Brandeis, J., concurring). Accordingly, I would affirm the judgment of the Court of Appeals.

ROBERTS *v.* LOUISIANA

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 76-5206. Argued March 28, 1977—Decided June 6, 1977

The mandatory death sentence imposed upon petitioner pursuant to a Louisiana statute for the first-degree murder of a police officer engaged in the performance of his lawful duties *held* to violate the Eighth and Fourteenth Amendments, since the statute allows for no consideration of particularized mitigating factors in deciding whether the death sentence should be imposed.

331 So. 2d 11, reversed and remanded.

Garland R. Rolling argued the cause and filed briefs for petitioner.

Louise Korns argued the cause for respondent. With her on the briefs were *William J. Guste, Jr.*, Attorney General of Louisiana, and *Harry F. Connick*.

Jules E. Orenstein, Assistant Attorney General, argued the cause for the State of New York as *amicus curiae*. With him on the brief were *Louis J. Lefkowitz*, Attorney General, and *Samuel A. Hirshowitz*, First Assistant Attorney General.*

PER CURIAM.

Petitioner Harry Roberts was indicted, tried, and convicted of the first-degree murder of Police Officer Dennis McInerney, who at the time of his death was engaged in the performance

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**Frank Carrington, Wayne W. Schmidt, Glen R. Murphy, Courtney Evans, Cecil Hicks*, and *James P. Costello* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging affirmance.

Evelle J. Younger, Attorney General, *Jack R. Winkler*, Chief Assistant Attorney General, *S. Clark Moore* and *William E. James*, Assistant Attorneys General, and *Howard J. Schwab* and *Alexander W. Kirkpatrick*, Deputy Attorneys General, filed a brief for the State of California as *amicus curiae*.

of his lawful duties. As required by a Louisiana statute, petitioner was sentenced to death. La. Rev. Stat. Ann. § 14:30 (2) (1974).[1] On appeal, the Supreme Court of Louisiana affirmed his conviction and sentence. 331 So. 2d 11 (1976). Roberts then filed a petition for a writ of certiorari in this Court. The petition presented the question whether Louisiana's mandatory death penalty could be imposed pursuant to his conviction of first-degree murder as defined in subparagraph (2) of § 14:30.

Shortly before that petition was filed, we held in another case (involving a different petitioner named Roberts) that Louisiana could not enforce its mandatory death penalty for a

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[1] That section provides in part:

"*First degree murder*

"First degree murder is the killing of a human being:

"(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or

"(2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or

"(3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or

"(4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; [or]

"(5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.

"For the purposes of Paragraph (2) herein, the term peace officer shall be defined [as] and include any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney or district attorneys' investigator.

"Whoever commits the crime of first degree murder shall be punished by death."

In 1975, § 14:30 (1) was amended to add the crime of aggravated burglary as a predicate felony for first-degree murder. 1975 La. Acts, No. 327.

conviction of first-degree murder as defined in subparagraph (1) of § 14:30 of La. Rev. Stat. Ann. (1974). *Roberts* v. *Louisiana*, 428 U. S. 325 (1976) (hereafter cited as *Stanislaus Roberts* for purposes of clarity). In the plurality opinion in that case, the precise question presented in this case was explicitly answered.[2]

This precise question was again answered by the Court in *Washington* v. *Louisiana*, 428 U. S. 906 (1976). The petitioner in the *Washington* case had killed a policeman and was tried and sentenced to death under the same provision of the Louisiana statute as was the petitioner in the present case. We vacated the death sentence, holding: "Imposition and carrying out of the death penalty [in this case] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Roberts* v. *Louisiana*. . . ." *Ibid.* See also *Sparks* v. *North Carolina*, 428 U. S. 905 (1976); *Green* v. *Oklahoma*, 428 U. S. 907 (1976).

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[2] "The diversity of circumstances presented in cases falling within the single category of killings during the commission of a specified felony, as well as the variety of possible offenders involved in such crimes, underscores the rigidity of Louisiana's enactment and its similarity to the North Carolina statute. Even the other more narrowly drawn categories of first-degree murder in the Louisiana law [one of these being the wilful, deliberate, and premeditated homicide of a fireman or a police officer engaged in the performance of his lawful duties] afford no meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender." 428 U. S., at 333–334.

"*Only* the third category of the Louisiana first-degree murder statute, covering intentional killing by a person serving a life sentence or by a person previously convicted of an unrelated murder, defines the capital crime at least in significant part in terms of the character or record of the individual offender. Although even this narrow category does not permit the jury to consider possible mitigating factors, a prisoner serving a life sentence presents a unique problem that may justify such a law. See *Gregg* v. *Georgia*, [428 U. S. 153, 186 (1976)]; *Woodson* v. *North Carolina*, [428 U. S. 280, 287 n. 7, 292–293, n. 25 (1976)]." *Id.*, at 334 n. 9 (emphasis added).

Recognizing that this Court had already decided that a mandatory death sentence could not be imposed for the crime that Harry Roberts committed, the Attorney General of Louisiana initially conceded that "under this Court's decision in *Stanislaus Roberts* v. *Louisiana*, No. 75–5844, [the sentence of death in the present case] cannot be carried out unless, of course, this Court grants Louisiana's Application for Rehearing and modifies its former holding." Brief in Opposition 2–3. The Court nevertheless granted certiorari on November 8, 1976, 429 U. S. 938, and on November 29 limited the grant to the question "[w]hether the imposition and carrying out of the sentence of death for the crime of first-degree murder of a police officer under the law of Louisiana violates the Eighth and Fourteenth Amendments to the Constitution of the United States." 429 U. S. 975.

In *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976), this Court held that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." In *Stanislaus Roberts*, *supra*, we made clear that this principle applies even where the crime of first-degree murder is narrowly defined. See n. 2, *supra*.

To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance. There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property.[3] But it is incorrect to suppose that no miti-

[3] We recognize that the life of a police officer is a dangerous one. Statistics show that the number of police officers killed in the line of duty has more than doubled in the last 10 years. In 1966, 57 law enforcement officers were killed in the line of duty; in 1975, 129 were killed. Federal Bureau of Investigation, Crime in the United States 1975, Uniform Crime Reports 223 (1976).

gating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions.[4]

As we emphasized repeatedly in *Stanislaus Roberts* and its companion cases decided last Term, it is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense.[5] Because the Louisiana statute does not allow for consideration of particularized mitigating factors, it is unconstitutional.[6]

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[4] See, *e. g.*, the portion of the proposed standards of the Model Penal Code quoted in *Gregg* v. *Georgia*, 428 U. S. 153, 193–194, n. 44 (1976).

[5] We reserve again the question whether or in what circumstances mandatory death sentence statutes may be constitutionally applied to prisoners serving life sentences. See n. 2, *supra*, quoting 428 U. S., at 334 n. 9.

[6] Indeed, our holding in *Jurek* v. *Texas*, 428 U. S. 262 (1976), that the Texas sentencing procedure was constitutionally adequate rested squarely on the fact that mitigating circumstances could be considered by the jury. In that case the joint opinion of JUSTICES STEWART, POWELL, and STEVENS stated:

"But a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we today have held in *Woodson* v. *North Carolina*, [428 U. S.,] at 303–305, to be required by the Eighth and Fourteenth Amendments. For such a system would approach the mandatory laws that we today hold unconstitutional in *Woodson* and *Roberts* v. *Louisiana* [428 U. S. 325 (1976)]. A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.

"Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances. In *Gregg* v. *Georgia*, we

Accordingly, we hold that the death sentence imposed upon this petitioner violates the Eighth and Fourteenth Amendments and must be set aside. The judgment of the Supreme Court of Louisiana is reversed insofar as it upholds the death sentence upon petitioner. The case is remanded for further proceedings not inconsistent with this opinion.[7]

It is so ordered.

MR. CHIEF JUSTICE BURGER, dissenting.

I would sustain the Louisiana statute and I therefore dissent on the basis of my dissenting statement in *Roberts* v. *Louisiana*, 428 U. S. 325, 337 (1976), and that of MR. JUSTICE WHITE in *Woodson* v. *North Carolina*, 428 U. S. 280, 306 (1976).

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST join, dissenting.

The Court, feeling itself bound by the plurality opinion in *Roberts* v. *Louisiana*, 428 U. S. 325 (1976) (hereafter *Stanislaus Roberts*), has painted itself into a corner. I did not join that plurality opinion, and I decline to be so confined. I therefore dissent from the Court's disposition of the present

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today hold constitutionally valid a capital-sentencing system that directs the jury to consider any mitigating factors, and in *Proffitt* v. *Florida* we likewise hold constitutional a system that directs the judge and advisory jury to consider certain enumerated mitigating circumstances. The Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions. Thus, the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors." *Id.*, at 271–272 (footnote omitted).

[7] In joining this opinion for the Court, MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL agree that the plurality opinion in *Stanislaus Roberts*, *supra*, controls this case, but adhere to their view that capital punishment is in all circumstances prohibited as cruel and unusual punishment by the Eighth and Fourteenth Amendments.

case and from its holding that the mandatory imposition of the death penalty for killing a peace officer, engaged in the performance of his lawful duties, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. I would uphold the State's power to impose such a punishment under La. Rev. Stat. Ann. § 14:30 (2) (1974), and I would reject any statements or intimations to the contrary in the Court's prior cases.

The *per curiam* opinion asserts that "the precise question presented in this case was explicitly answered" in *Stanislaus Roberts*. *Ante*, at 635. It also relies on the summary disposition of *Washington* v. *Louisiana*, 428 U. S. 906 (1976), where a death sentence that had been imposed under § 14:30 (2) was vacated and where it was stated that the imposition and carrying out of the death penalty constituted cruel and unusual punishment. *Ante*, at 635. Finally, the *per curiam* states that "it is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense." *Ante*, at 637. Since § 14:30 (2) does not allow for consideration of mitigating factors, the *per curiam* strikes down the death sentence imposed on petitioner.

In my view, the question of the constitutionality of Louisiana's mandatory death penalty for killing a peace officer was not answered in *Stanislaus Roberts*. *Washington* may be said to be a summary ruling on the merits, but that case was decided without the benefit of plenary consideration, and without focusing on the identity and activity of the victim. I believe its result to be incorrect as a constitutional matter and I would disapprove and withhold its further application.

Stanislaus Roberts was charged and convicted under a different subsection, that is, § 14:30 (1), of the Louisiana first-degree murder statute. See 428 U. S., at 327. See also *ante*, at 634–635. Subsection (1) provided a mandatory death penalty in the case where the killer had a specific intent to kill or

to inflict great bodily harm and was engaged in the perpetration or attempted perpetration of aggravated kidnaping, aggravated rape, or armed robbery. See *ante*, at 634 n. 1. Subsection (2), in contrast, provides that first-degree murder is committed when the killer has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who is engaged in the performance of his lawful duties. *Ibid.* The two subsections obviously should involve quite different considerations with regard to the lawfulness of a mandatory death penalty, even accepting the analysis set forth in the joint opinions of last Term.* Thus, to the extent that the plurality in *Stanislaus Roberts* alluded to subsections of the Louisiana law that were not before the Court, those statements are nonbinding dicta. It is indisputable that carefully focused consideration was not given to the special problem of a mandatory death sentence for one who has intentionally killed a police officer engaged in the performance of his lawful duties. I therefore approach this case as a new one, not predetermined and governed by the plurality in *Stanislaus Roberts*.

Washington may present a different problem. It did decide the issue now before the Court, but it did so without the benefit of full briefing and argument, and it was one of three pending Louisiana cases treated as a cluster and routinely remanded at the Term's end in the immediate wake of *Stanislaus Roberts*. Because an explicit finding was made that the death penalty constituted cruel and unusual punishment, perhaps *Washington* is not to be treated in the same way as summary affirmances were treated in *Edelman* v. *Jordan*, 415 U. S. 651, 670–671 (1974). I would simply inquire, as to *Washington*, whether its holding should not be overruled,

Gregg v. *Georgia*, 428 U. S. 153 (1976); *Proffitt* v. *Florida*, 428 U. S. 242 (1976); *Jurek* v. *Texas*, 428 U. S. 262 (1976); *Woodson* v. *North Carolina*, 428 U. S. 280 (1976); and *Stanislaus Roberts*, 428 U. S. 325 (1976).

now that the Court has had the benefit of more careful and complete consideration of the issue.

On the merits, for reasons I have expressed before, I would not find § 14:30 (2) constitutionally defective. See *Furman* v. *Georgia*, 408 U. S. 238, 405–414 (1972) (dissenting opinion). See also *Stanislaus Roberts*, 428 U. S., at 337–363 (WHITE, J., dissenting). Furthermore, even under the opinions of last Term, I would conclude that § 14:30 (2) falls within that narrow category of homicide for which a mandatory death sentence is constitutional. See *Gregg* v. *Georgia*, 428 U. S. 153, 186 (1976); *Woodson* v. *North Carolina*, 428 U. S. 280, 287 n. 7, 292–293, n. 25 (1976); *Stanislaus Roberts*, 428 U. S., at 334 n. 9. Since the decision in *Washington* is inconsistent with this view, I would overrule it.

I should note that I do not read the *per curiam* opinion today as one deciding the issue of the constitutionality of a mandatory death sentence for a killer of a peace officer for all cases and all times. Reference to the plurality opinion in *Stanislaus Roberts* reveals that the Louisiana statute contained what that opinion regarded as two fatal defects: lack of an opportunity to consider mitigating factors, and standardless jury discretion inherent in the Louisiana responsive verdict system. Without the latter, as here, a different case surely is presented. Furthermore, it is evident, despite the *per curiam*'s general statement to the contrary, that mitigating factors need not be considered in every case; even the *per curiam* continues to reserve the issue of a mandatory death sentence for murder by a prisoner already serving a life sentence. *Ante*, at 637 n. 5. Finally, it is possible that a state statute that required the jury to consider, during the guilt phase of the trial, both the aggravating circumstance of killing a peace officer and relevant mitigating circumstances would pass the plurality's test. Cf. *Jurek* v. *Texas*, 428 U. S. 262, 270–271 (1976). For me, therefore, today's decision must be viewed in the context of the Court's previous criticism of the Louisiana system;

it need not freeze the Court into a position that condemns every statute with a mandatory death penalty for the intentional killing of a peace officer.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE WHITE joins, dissenting.

The Court today holds that the State of Louisiana is not entitled to vindicate its substantial interests in protecting the foot soldiers of an ordered society by mandatorily sentencing their murderers to death. This is so even though the State has demonstrated to a jury in a fair trial, beyond a reasonable doubt, that a particular defendant was the murderer, and that he committed the act while possessing "a specific intent to kill, or to inflict great bodily harm upon, . . . a peace officer who was engaged in the performance of his lawful duties . . . ." La. Rev. Stat. Ann. § 14:30 (2) (1974). That holding would have shocked those who drafted the Bill of Rights on which it purports to rest, and would commend itself only to the most imaginative observer as being required by today's "evolving standards of decency."

I am unable to agree that a mandatory death sentence under such circumstances violates the Eighth Amendment's proscription against "cruel and unusual punishments." I am equally unable to see how this limited application of the mandatory death statute violates even the scope of the Eighth Amendment as seen through the eyes of last Term's plurality in *Roberts* v. *Louisiana*, 428 U. S. 325 (1976) (hereafter *Stanislaus Roberts*). Nor does the brief *per curiam* opinion issued today demonstrate why the application of a mandatory death sentence to the criminal who intentionally murders a peace officer performing his official duties should be considered "cruel and unusual punishment" in light of either the view of society when the Eighth Amendment was passed, *Gregg* v. *Georgia*, 428 U. S. 153, 176–177 (1976); the "objective indicia that reflect the public attitude" today, *id.*, at 173; or even the more

generalized "basic concept of human dignity" test relied upon last Term in striking down several more general mandatory statutes.

While the arguments weighing in favor of individualized consideration for the convicted defendant are much the same here as they are for one accused of any homicide, the arguments weighing in favor of society's determination to impose a mandatory sentence for the murder of a police officer in the line of duty are far stronger than in the case of an ordinary homicide. Thus the Court's intimation that this particular issue was *considered* and *decided* last Term in *Stanislaus Roberts, supra,* simply does not wash. A footnoted dictum in *Stanislaus Roberts* discussing a different section of the Louisiana law from the one now before us scarcely rises to the level of plenary, deliberate consideration which has traditionally preceded a declaration of unconstitutionality.

Such a meager basis for *stare decisis* would be less offensive were we not dealing with large questions of how men shall be governed, and how liberty and order should be balanced in a civilized society. But authority which might suffice to determine whether the rule against perpetuities applies to a particular devise in a will does not suffice when making a constitutional adjudication that a punishment imposed by properly enacted state law is "cruel and unusual." Mr. Justice Frankfurter wisely noted that a "footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine," *Kovacs* v. *Cooper,* 336 U. S. 77, 90–91 (1949); it is hardly a more appropriate device by which to anticipate a constitutional issue not presented by the case in which it appears. This seemingly heedless wielding of our power is least acceptable when we engage in what Mr. Justice Holmes described as "the gravest and most delicate duty that this Court is called upon to perform." *Blodgett* v. *Holden,* 275 U. S. 142, 147–148 (1927) (separate opinion).

Five Terms ago, in *Furman* v. *Georgia*, 408 U. S. 238 (1972), this Court invalidated the then-current system of capital punishments, condemning jury discretion as resulting in "freakish" punishment. The Louisiana Legislature has conscientiously determined, in an effort to respond to that holding, that the death sentence would be made mandatory upon the conviction of particular types of offenses, including, as in the case before us, the intentional killing of a peace officer while in the performance of his duties. For the reasons stated by MR. JUSTICE WHITE for himself, THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and me in his dissent in *Stanislaus Roberts*, *supra*, and by me in my dissent in *Woodson* v. *North Carolina*, 428 U. S. 280, 308 (1976), I am no more persuaded now than I was then that a mandatory death sentence for all, let alone for a limited class of, persons who commit premeditated murder constitutes "cruel and unusual punishment" under the Eighth and Fourteenth Amendments.

But even were I now persuaded otherwise by the plurality's analysis last Term, and were I able to conclude that the mandatory death penalty constituted "cruel and unusual punishment" when applied generally to all those convicted of first-degree murder, I would nonetheless disagree with today's opinion. Louisiana's decision to impose a mandatory death sentence upon one convicted of the particular offense of premeditated murder of a peace officer engaged in the performance of his lawful duties is clearly not governed by the holding of *Stanislaus Roberts*, and I do not believe that it is controlled by the reasoning of the plurality's opinion in that case. Today's opinion assumes, without analysis, that the faults of the generalized mandatory death sentence under review in *Stanislaus Roberts*, must necessarily inhere in such a sentence imposed on those who commit this much more carefully limited and far more serious crime.[1] In words that would be

[1] In *Woodson*, the plurality noted that a public opinion poll "revealed that a 'substantial majority' of persons opposed mandatory capital punish-

equally appropriate today, MR. JUSTICE WHITE noted last Term, 428 U. S., at 358:

> "Even if the character of the accused *must* be considered under the Eighth Amendment, surely a State is not constitutionally forbidden to provide that the commission of certain crimes conclusively establishes that the criminal's character is such that he deserves death. Moreover, quite apart from the character of a criminal, a State should constitutionally be able to conclude that the need to deter some crimes and that the likelihood that the death penalty will succeed in deterring these crimes is such that the death penalty may be made mandatory for all people who commit them. Nothing resembling a reasoned basis for the rejection of these propositions is to be found in the plurality opinion."

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ment." 428 U. S., at 298–299, n. 34. It does not follow, even accepting that poll, that a "substantial majority" oppose mandatory capital punishment for the murderers of police officers. What meager statistics there are indicate that public opinion is at best pretty evenly divided on the subject. In a June 1973 Harris Survey, 41% of the people surveyed thought that "all" persons convicted of killing a policeman or a prison guard should get the death penalty, as opposed to 28% for the more general crime of first-degree murder. Vidmar & Ellsworth, Public Opinion and the Death Penalty, 26 Stan. L. Rev. 1245, 1252 (1974). A May 1973 poll in Minnesota revealed that 49% of the sample favored "automatic" capital punishment for " 'murder of a law enforcement officer.' " *Id.*, at 1251. With such substantial public support, one would have thought that the determination as to whether a mandatory death penalty should exist was for the legislature, not for the judiciary through some newfound construction of the term "cruel and unusual punishments." Yet while the plurality observes that "[c]entral to the application of the Amendment is a determination of contemporary standards regarding the infliction of punishment," 428 U. S., at 288, the opinion today makes absolutely no attempt to discuss "contemporary standards" with respect to the particular category now before us. The reason, of course, is not hard to deduce: the plurality's separation of "standards of decency" from "the dignity of man" indicates that, with respect to the latter, the plurality itself, and not society, is to be the arbiter.

Under the analysis of last Term's plurality opinion, a State, before it is constitutionally entitled to put a murderer to death, must consider aggravating and mitigating circumstances. It is possible to agree with the plurality in the general case without at all conceding that it follows that a mandatory death sentence is impermissible in the specific case we have before us: the deliberate killing of a peace officer. The opinion today is willing to concede that "the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance." *Ante,* at 636. But it seems to me that the factors which entitle a State to consider it as an aggravating circumstance also entitle the State to consider it so grave an aggravating circumstance that no permutation of mitigating factors exists which would disable it from constitutionally sentencing the murderer to death. If the State would be constitutionally entitled, due to the nature of the offense, to sentence the murderer to death *after* going through such a limited version of the plurality's "balancing" approach, I see no constitutional reason why the "Cruel and Unusual Punishments" Clause precludes the State from doing so without engaging in that process.

The elements that differentiate this case from the *Stanislaus Roberts* case are easy to state. In both cases, the factors weighing on the defendant's side of the scale are constant. It is consideration of these factors alone that the opinion today apparently relies on for its holding. But this ignores the significantly different factors which weigh on the State's side of the scale. In all murder cases, and of course this one, the State has an interest in protecting its citizens from such ultimate attacks; this surely is at the core of the Lockean "social contract" idea. But other, and important, state interests exist where the victim was a peace officer performing his lawful duties. Policemen on the beat are exposed, in the service of society, to all the risks which the constant effort to prevent crime and apprehend criminals entails: Because these people

are literally the foot soldiers of society's defense of ordered liberty, the State has an especial interest in their protection.

We are dealing here not merely with the State's determination as to whether particular conduct on the part of an individual should be punished, and in what manner, but also with what sanctions the State is entitled to bring into play to assure that there will be a police force to see that the criminal laws are enforced at all. It is no service to individual rights, or to individual liberty, to undermine what is surely the fundamental right and responsibility of any civilized government: the maintenance of order so that all may enjoy liberty and security. Learned Hand surely had it right when he observed:

> "And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few; as we have learned to our sorrow." The Spirit of Liberty 190 (3d ed., 1960).

Policemen are both symbols and outriders of our ordered society, and they literally risk their lives in an effort to preserve it. To a degree unequaled in the ordinary first-degree murder presented in the *Stanislaus Roberts* case, the State therefore has an interest in making unmistakably clear that those who are convicted of deliberately killing police officers acting in the line of duty be forewarned that punishment, in the form of death, will be inexorable.[2]

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[2] Cf. 4 W. Blackstone, Commentaries *82:

"To resist the king's forces by defending a castle against them, is a levying of war . . . . But a tumult, with a view to pull down a particular house, or lay open a particular inclosure, amounts at most to a riot; this being no general defiance of public government."

As recently noted by Chief Justice Laskin of the Canadian Supreme Court,

This interest of the State, I think, entitled the Louisiana Legislature, in its considered judgment, to make the death penalty mandatory for those convicted of the intentional murder of a police officer. I had thought JUSTICES STEWART, POWELL, and STEVENS had conceded that this response—this need for a mandatory penalty—could be permissible when, focusing on the crime, not the criminal, they wrote last Term in *Gregg*, 428 U. S., at 184, that

> "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain *crimes* are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." (Emphasis added.)

I am quite unable to decipher why the Court today concludes that the intentional murder of a police officer is not one of these "certain crimes." The Court's answer appears to lie in its observation that "it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer." *Ante*, at 636–637. The Court, however, has asked the wrong question. The question is not whether mitigating

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Miller and Cockriell v. *The Queen*, 70 D. L. R. 3d 324, 337, [1976] 5 W. W. R. 711, 735 (1976), in discussing whether a mandatory death sentence constituted "cruel and unusual punishment" within the meaning of § 2 (*b*) of the Canadian Bill of Rights:

"I do not think, however, that it can be said that Parliament, in limiting the mandatory death penalty to the murder of policemen and prison guards, had only vengeance in view. There was obviously the consideration that persons in such special positions would have a sense of protection by reason of the grave penalty that would follow their murder . . . . It was open to Parliament to act on these additional considerations in limiting the mandatory death penalty as it did, and I am unable to say that they were not acted upon. On this view, I cannot find that there was no social purpose served by the mandatory death penalty so as to make it offensive to § 2 (*b*)." (Concurring opinion.)

factors might *exist*, but, rather, whether whatever "mitigating" factors that might exist are of sufficient *force* so as to constitutionally require their consideration as counterweights to the admitted aggravating circumstance. Like MR. JUSTICE WHITE, I am unable to believe that a State is not entitled to determine that the premeditated murder of a peace officer is so heinous and intolerable a crime that no combination of mitigating factors can overcome the demonstration "that the criminal's character is such that he deserves death." 428 U. S., at 358.

As an example of a mitigating factor which, presumably, may "overcome" the aggravating factor inherent in the murder of a peace officer, the Court today gives us the astonishing suggestion of "the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct . . . ." *Ante*, at 637. I cannot believe that States are constitutionally required to allow a defense, even at the sentencing stage, which depends on nothing more than the convict's moral belief that he was entitled to kill a peace officer in cold blood. John Wilkes Booth may well have thought he was morally justified in murdering Abraham Lincoln, whom, while fleeing from the stage of Ford's Theater, he characterized as a "tyrant"; I am appalled to believe that the Constitution would have *required* the Government to allow him to argue that as a "mitigating factor" before it could sentence him to death if he were found guilty. I am equally appalled that a State should be required to instruct a jury that such individual beliefs must or should be considered as a possible balancing factor against the admittedly proper aggravating factor.

The historical and legal content of the "Cruel and Unusual Punishments" Clause was stretched to the breaking point by the plurality's opinion in the *Stanislaus Roberts* case last Term. Today this judicially created superstructure, designed and erected more than 180 years after the Bill of Rights was

adopted, is tortured beyond permissible limits of judicial review. There is nothing in the Constitution's prohibition against cruel and unusual punishment which disables a legislature from imposing a mandatory death sentence on a defendant convicted after a fair trial of deliberately murdering a police officer.

Syllabus

ABNEY ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 75–6521. Argued January 17, 1977—Decided June 9, 1977

Petitioners and others were charged in a single-count indictment with conspiracy and an attempt to obstruct interstate commerce by means of extortion, in violation of the Hobbs Act. Petitioners challenged the indictment as duplicitous, contending that its single count improperly charged *both* a conspiracy and an attempt to violate the Hobbs Act. The District Court refused to dismiss the indictment but required the prosecution to prove all the elements of both offenses charged in the indictment, and instructed the jury to that effect. The jury returned a guilty verdict against each petitioner. The Court of Appeals reversed and ordered a new trial on certain evidentiary grounds, at the same time directing the Government to elect between the conspiracy and attempt charges on remand. After the Government elected to proceed on the conspiracy charge, petitioners moved to dismiss the indictment on grounds that the retrial would expose them to double jeopardy and that the indictment, as modified by the election, failed to charge an offense. The District Court denied the motion, and petitioners immediately appealed. The Court of Appeals affirmed, but did not address the Government's argument that the court had no jurisdiction to hear the appeal since the denial of petitioners' motion to dismiss the indictment was not a "final decision" within the meaning of 28 U. S. C. § 1291, which grants courts of appeals jurisdiction to review "all final decisions" of the district courts, both civil and criminal. *Held:*

1. The District Court's pretrial order denying petitioners' motion to dismiss the indictment on double jeopardy grounds was a "final decision" within the meaning of § 1291, and thus was immediately appealable. Pp. 656–662.

(a) Although lacking the finality traditionally considered indispensable to appellate review, such an order falls within the "collateral order" exception to the final-judgment rule announced in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, since it constitutes a complete, formal, and, in the trial court, final rejection of an accused's double jeopardy claim, the very nature of which is such that it is collateral to, and separable from, the principal issue of whether or not the accused is guilty of the offense charged. Pp. 657–660.

(b) Moreover, the rights conferred on an accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence, since that Clause not only protects an individual against being subjected to double punishments but also is a guarantee against being twice put to *trial* for the same offense. Pp. 660–662.

2. The Court of Appeals had no jurisdiction under § 1291 to pass on the merits of petitioners' challenge to the sufficiency of the indictment, since the District Court's rejection of such challenge does not come within the *Cohen* exception. That rejection is not "collateral" in any sense of that term, but rather goes to the very heart of the issues to be resolved at the upcoming trial. Moreover, the issue resolved adversely to petitioners is such that it may be reviewed effectively, and, if necessary, corrected if and when a final judgment results. Pp. 662–663.

3. The Double Jeopardy Clause does not preclude petitioners' retrial on the conspiracy charge. It cannot be assumed that the jury disregarded the District Court's instructions at the initial trial that it could not return a guilty verdict unless the Government proved beyond a reasonable doubt all of the elements of both offenses charged in the indictment, and therefore it would appear that the jury did not acquit petitioners of the conspiracy charge, while convicting them on the attempt charge, as petitioners urge was a possibility in view of the general verdict. Pp. 663–665.

530 F. 2d 963, affirmed in part, reversed in part, and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. WHITE, J., concurred in the judgment.

Ralph David Samuel argued the cause for petitioners. With him on the briefs were *Thomas C. Carroll, Mark D. Schaffer,* and *Joel Harvey Slomsky.*

Assistant Attorney General Thornburgh argued the cause for the United States. With him on the brief were *Solicitor General Bork, Shirley Baccus-Lobel,* and *Marc Philip Richman.**

**Veryl L. Riddle, Thomas C. Walsh,* and *Robert F. Scoular* filed a brief for Alexander J. Barket as *amicus curiae.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds is a final decision within the meaning of 28 U. S. C. § 1291,[1] and thus immediately appealable. If it is a final decision, we must also decide: (a) whether the Double Jeopardy Clause bars the instant prosecution; (b) whether the courts of appeals have jurisdiction to consider non-double-jeopardy claims presented pendent to such appeals; and, if so, (c) whether the Court of Appeals erred in refusing to dismiss the indictment on the alternative grounds asserted by the petitioners.

(1)

In March 1974, a single-count indictment was returned in the United States District Court for the Eastern District of Pennsylvania charging petitioners, Donald Abney, Larry Starks, and Alonzo Robinson, and two others, with conspiracy and an attempt to obstruct interstate commerce by means of extortion, in violation of the Hobbs Act, 18 U. S. C. § 1951.[2] The Government's case was based upon the testimony of one Ulysses Rice, the alleged victim of the conspiracy. Rice was

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[1] Section 1291 provides as follows:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

[2] Section 1951 provides in pertinent part:

"Whoever . . . obstructs, delays, or affects commerce . . . by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

the owner and operator of a Philadelphia, Pa., tavern selling liquor that was distilled and bottled outside of the State. According to Rice, petitioners had engaged in a pattern of extortionate practices against him. Initially, such activities had been thinly veiled under the pretense of solicitations for subscriptions to Black Muslim newspapers, sales of various food items, and appeals for contributions for a Black Muslim holiday. Eventually, however, demands for larger sums of money, including $200 in weekly "taxes" accompanied by threats, were made upon Rice at his place of business. These threats led Rice to contact the Federal Bureau of Investigation which provided him with "marked money" and a body tape recorder in anticipation of future demands by the petitioners. When such a demand was made, Rice paid it with the marked currency and recorded the transaction on the body recorder. Petitioners were arrested despite their claims that all of the contributions by Rice had been bona fide gifts for Muslim religious causes. The tape recording of the last transaction was later introduced at petitioners' trial and, not surprisingly, it proved useful in refuting this claim of innocent purpose.

Both prior to, and during, the ensuing trial, the petitioners challenged the indictment on grounds of duplicity of offenses, claiming that its single count improperly charged *both* a conspiracy and an attempt to violate the Hobbs Act. Although the District Court apparently agreed with this contention, it refused either to dismiss the indictment or require the prosecutor to elect between theories. Rather, it required the Government to establish both offenses, as the prosecutor represented that he would do, and instructed the jury to that effect:

> "I would also point out that in the indictment it is charged that the defendants were guilty of both conspiracy and attempt and the *essential elements of both of these offenses must be proved before any defendant could be found guilty.*" Tr. 10–60 (emphasis added).

The jury returned a guilty verdict against each petitioner, but acquitted two others charged in the indictment.

On appeal, the United States Court of Appeals for the Third Circuit reversed petitioners' convictions and ordered a new trial on the ground that the key tape recording had been admitted into evidence without proper authentication. *United States* v. *Starks*, 515 F. 2d 112 (1975). The Court of Appeals also agreed with the petitioners' claim that the indictment was duplicitous. *Id.*, at 115–118. However, since the admission of the unauthenticated tape recording necessitated a new trial in any event, the court found it unnecessary to pass on the Government's argument that the indictment's duplicitous nature had been corrected by the trial court's instructions to the jury and was thus harmless. *Id.*, at 118. Nonetheless, it directed the Government to elect between the conspiracy and attempt charges on remand in order to avoid any similar problems at the next trial. *Id.*, at 118, 125.

On remand, the Government elected to proceed on the conspiracy charge. Petitioners then moved to dismiss the indictment, arguing: (a) that retrial would expose them to double jeopardy; and (b) that the indictment, as modified by the election, failed to charge an offense. The District Court denied the motion, and the petitioners immediately appealed to the Court of Appeals.

Before addressing the merits of petitioners' claims, the Government challenged the Court of Appeals' jurisdiction to hear the interlocutory appeal and asked that its prior decision in *United States* v. *DiSilvio*, 520 F. 2d 247 (1975), be overruled; there the court had held that the denial of a pretrial motion to dismiss an indictment on double jeopardy grounds constituted a final decision within the meaning of 28 U. S. C. § 1291, and, as such, was immediately appealable. 520 F. 2d, at 248 n. 2a. The Court of Appeals failed to address the Government's argument. Rather, after ordering the case to

be submitted on the briefs without oral argument, it affirmed the District Court by a judgment order which explicitly rejected both of the petitioners' attacks on the indictment. We granted certiorari to review the decision of the Court of Appeals.

(2)

We approach the threshold appealability question with two principles in mind. First, it is well settled that there is no constitutional right to an appeal. *McKane* v. *Durston*, 153 U. S. 684 (1894). Indeed, for a century after this Court was established, no appeal as of right existed in criminal cases, and, as a result, appellate review of criminal convictions was rarely allowed.[3] As the Court described this period in *Reetz* v. *Michigan*, 188 U. S. 505 (1903):

> "[T]rials under the Federal practice for even the gravest offences ended in the trial court, except in cases where two judges were present and certified a question of law to this court." *Id.*, at 508.

The right of appeal, as we presently know it in criminal cases, is purely a creature of statute; in order to exercise that statutory right of appeal one must come within the terms of the applicable statute—in this case, 28 U. S. C. § 1291.

Second, since appeals of right have been authorized by Congress in criminal cases, as in civil cases, there has been a firm congressional policy against interlocutory or "piecemeal" appeals and courts have consistently given effect to that policy. Finality of judgment has been required as a predicate for federal appellate jurisdiction.

> "The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First

[3] Appeals as of right in criminal cases were first permitted in 1889 when Congress enacted a statute allowing such appeals "in all cases of conviction of crime the punishment of which provided by law is death." Act of Feb. 6, 1889, 25 Stat. 656. A general right of appeal in criminal cases was not created until 1911. Act of Mar. 3, 1911, 36 Stat. 1133.

> Congress, requires that review of *nisi prius* proceedings await their termination by final judgment." *DiBella* v. *United States*, 369 U. S. 121, 124 (1962).

Accord, *Cobbledick* v. *United States*, 309 U. S. 323, 324–326 (1940). This principle is currently embodied in 28 U. S. C. § 1291 which grants the federal courts of appeals jurisdiction to review "all final decisions of the district courts," both civil and criminal. Adherence to this rule of finality has been particularly stringent in criminal prosecutions because "the delays and disruptions attendant upon intermediate appeal," which the rule is designed to avoid, "are especially inimical to the effective and fair administration of the criminal law." *DiBella, supra*, at 126. Accord, *Cobbledick, supra*, at 324–326.

The pretrial denial of a motion to dismiss an indictment on double jeopardy grounds is obviously not "final" in the sense that it terminates the criminal proceedings in the district court. Nonetheless, a number of the Courts of Appeals have held that § 1291 does not bar an immediate appeal from such a pretrial order. *United States* v. *Barket*, 530 F. 2d 181 (CA8 1975), cert. denied, 429 U. S. 917 (1976); *United States* v. *Beckerman*, 516 F. 2d 905 (CA2 1975); *United States* v. *Lansdown*, 460 F. 2d 164 (CA4 1972). Contra, *United States* v. *Young*, 544 F. 2d 415 (CA9 1976); *United States* v. *Bailey*, 512 F. 2d 833 (CA5 1975). In reaching this conclusion, those courts have taken the position that such pretrial orders fall within the so-called "collateral order" exception to the final-judgment rule first announced in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), and are thus "final decisions" within the meaning of § 1291.

Cohen was a shareholder's derivative civil action in which federal jurisdiction rested on the diverse citizenship of the parties. Prior to trial, a question arose over whether a state statute requiring the plaintiff shareholder to post security for the costs of litigation applied in the federal court. After the District Court denied its motion to require such security, the

corporate defendant sought immediate appellate review of the ruling in the Court of Appeals. That court reversed and ordered that security be posted. Thereafter, this Court held that the Court of Appeals had jurisdiction under § 1291 to entertain an appeal from the District Court's pretrial order.

In holding that the pretrial order was a "final decision" for purposes of § 1291, the Court recognized that § 1291 did not uniformly limit appellate jurisdiction to "those final judgments which terminate an action." 337 U. S., at 545; *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 171 (1974). Rather as Mr. Justice Jackson, the author of *Cohen*, later pointed out:

> "[I]t is a final *decision* that Congress has made reviewable. . . . While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment." *Stack* v. *Boyle*, 342 U. S. 1, 12 (1951) (separate opinion).

That term, the Court held, was to be given a "practical rather than a technical construction." *Cohen*, *supra*, at 546. In giving it such a construction, the Court identified several factors which, in its view, rendered the District Court's order a "final decision" within the statute's meaning. First, the District Court's order had fully disposed of the question of the state security statute's applicability in federal court; in no sense, did it leave the matter "open, unfinished or inconclusive." *Ibid.* Second, the decision was not simply a "step toward final disposition of the merits of the case [which would] be merged in final judgment"; rather, it resolved an issue completely collateral to the cause of action asserted. *Ibid.* Finally, the decision had involved an important right which would be "lost, probably irreparably," if review had to await final judgment; hence, to be effective, appellate review in that special, limited setting had to be immediate. *Ibid.* The Court concluded:

> "This decision appears to fall in that small class which finally determine claims of right separable from, and

collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.*, at 546.

Although it is true that a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds lacks the finality traditionally considered indispensable to appellate review, we conclude that such orders fall within the "small class of cases" that *Cohen* has placed beyond the confines of the final-judgment rule.[4] In the first place there can be no doubt that such orders constitute a complete, formal, and, in the trial court, final rejection of a criminal defendant's double jeopardy claim. There are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee. Hence, *Cohen*'s threshold requirement of a fully consummated decision is satisfied.

Moreover, the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i. e.*, whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction. See *DiBella* v. *United States, supra; Cogen* v. *United States*, 278 U. S. 221 (1929). Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him. *Menna* v.

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[4] Of course, *Cohen*'s collateral-order exception is equally applicable in both civil and criminal proceedings. While *Cohen* itself was a civil case, the Court's decision was based on its construction of 28 U. S. C. § 1291. As previously noted, that provision gives the courts of appeals jurisdiction to review "final decisions" of the district courts in both civil and criminal cases. See *Stack* v. *Boyle*, 342 U. S. 1 (1951).

New York, 423 U. S. 61 (1975); *Blackledge* v. *Perry*, 417 U. S. 21, 30 (1974); *Robinson* v. *Neil*, 409 U. S. 505, 509 (1973). The elements of that claim are completely independent of his guilt or innocence. Indeed, we explicitly recognized that fact in *Harris* v. *Washington*, 404 U. S. 55 (1971), where we held that a State Supreme Court's rejection of an accused's pretrial plea of former jeopardy constituted a "final" order for purposes of our appellate jurisdiction under 28 U. S. C. § 1257.[5]

> "Since the state courts have finally rejected a claim that the Constitution forbids a second *trial* of the petitioner, a claim separate and apart from the question whether the petitioner may constitutionally be *convicted* of the crimes with which he is charged, our jurisdiction is properly invoked under 28 U. S. C. § 1257." 404 U. S., at 56.

Accord, *Turner* v. *Arkansas*, 407 U. S. 366 (1972); *Colombo* v. *New York*, 405 U. S. 9 (1972). Thus, the matters embraced in the trial court's pretrial order here are truly collateral to the criminal prosecution itself in the sense that they will not "affect, or . . . be affected by, decision of the merits of this case." *Cohen*, 337 U. S., at 546.

Finally, the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments.

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[5] Section 1257 provides in pertinent part:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . ."

It is a guarantee against being twice put to *trial* for the same offense.[6]

> " 'The Constitution of the United States, in the Fifth Amendment, declares, "nor shall any person be subject [for the same offense] to be twice put in jeopardy of life or limb." The prohibition is not against being twice punished, but against being twice *put* in jeopardy . . . .' . . . The 'twice put in jeopardy' language of the Constitution thus relates to a potential, *i. e.*, the risk that an accused for a second time will be convicted of the 'same offense' for which he was initially tried." *Price* v. *Georgia*, 398 U. S. 323, 326 (1970).

See also *United States* v. *Jorn*, 400 U. S. 470, 479 (1971); *Green* v. *United States*, 355 U. S. 184, 187–188 (1957); *United States* v. *Ball*, 163 U. S. 662, 669 (1896). Because of this focus on the "risk" of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction. Mr. Justice Black aptly described the purpose of the Clause:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him

[6] See also *Ex parte Lange*, 18 Wall. 163, 169 (1874):

"The common law not only prohibited a second punishment for the same offence, *but it went further and* [*forbade*] *a second trial for the same offence*, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted." (Emphasis added.)

to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green, supra,* at 187–188.

Accord, *Breed* v. *Jones,* 421 U. S. 519, 529–530 (1975); *Serfass* v. *United States,* 420 U. S. 377, 387–388 (1975); *Jorn, supra,* at 479. Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit.[7] Consequently, if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.

We therefore hold that pretrial orders rejecting claims of former jeopardy, such as that presently before us, constitute "final decisions" and thus satisfy the jurisdictional prerequisites of § 1291.[8]

(3)

In determining that the courts of appeals may exercise jurisdiction over an appeal from a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds,

[7] A cogent analogy can be drawn to the *Cohen* decision. There, the corporate defendant claimed that the state security statute, if applicable, conferred on it a right not to face trial at all unless the dissatisfied shareholder first posted security for the costs of the litigation. By permitting an immediate appeal under those circumstances, this Court made sure that the benefits of the statute were not "canceled out."

[8] Admittedly, our holding may encourage some defendants to engage in dilatory appeals as the Solicitor General fears. However, we believe that such problems of delay can be obviated by rules or policies giving such appeals expedited treatment. It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy.

we, of course, do not hold that other claims contained in the motion to dismiss are immediately appealable as well. *United States* v. *Barket*, 530 F. 2d 181 (CA8 1975), cert. denied, 429 U. S. 917 (1976). Our conclusion that a defendant may seek immediate appellate review of a district court's rejection of his double jeopardy claim is based on the special considerations permeating claims of that nature which justify a departure from the normal rule of finality. Quite obviously, such considerations do not extend beyond the claim of former jeopardy and encompass other claims presented to, and rejected by, the district court in passing on the accused's motion to dismiss. Rather, such claims are appealable if, and only if, they too fall within *Cohen*'s collateral-order exception to the final-judgment rule. Any other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence.

Here, we think it clear that the District Court's rejection of petitioners' challenge to the sufficiency of the indictment does not come within the *Cohen* exception. First, an order denying a motion to dismiss an indictment for failure to state an offense is plainly not "collateral" in any sense of that term; rather it goes to the very heart of the issues to be resolved at the upcoming trial. Secondly, the issue resolved adversely to petitioners is such that it may be reviewed effectively, and, if necessary, corrected if and when a final judgment results. We therefore conclude that the Court of Appeals had no jurisdiction under § 1291 to pass on the merits of petitioners' challenge to the sufficiency of the indictment at this juncture in the proceedings.

(4)

We turn finally to the merits of petitioners' claim that their retrial, following the prosecutor's election to proceed on the single conspiracy charge, is barred by the Double Jeopardy

Clause. Their argument focuses on both the duplicitous indictment under which they were charged and the general verdict of guilty returned by the jury at their first trial. They maintain that because the indictment's single count charged them with both a conspiracy and an attempt to violate the Hobbs Act, it is impossible to determine the basis of the general verdict of guilt returned against them. Hence, they suggest that the jury might have convicted them on the attempt charge, but acquitted them of the charged conspiracy. This possibility, they conclude, prohibits their retrial on the conspiracy charge.

Whatever the merits of such an argument in another setting, we find no factual predicate for it here.[9] As we noted in our description of the petitioners' initial trial, the prosecutor, rather than electing between the attempt and conspiracy charges, represented to the court that he would establish *both* offenses. The court held him to his word and instructed the jury that it would have to find that the Government had established all of the elements of *both* crimes before it could return a verdict of guilty against the petitioners.[10] Indeed,

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[9] In view of our determination that no factual predicate exists for petitioners' claim that the jury rendered an ambiguous verdict at their original trial, we find it unnecessary to reach the question of whether, assuming such ambiguity, their retrial would have been nonetheless permissible. See *United States* v. *Tateo*, 377 U. S. 463 (1964).

[10] In addition to the portion of the charge set out *supra*, at 654, the trial court gave the following instructions to the jury:

"[T]he defendants are charged not with the so-called substantive offense itself but rather with a conspiracy and attempt to obstruct, delay and affect interstate commerce by extortion. If the jury should find beyond a reasonable doubt that there was a conspiracy and an attempt to extort money from Mr. Rice, the natural and probable consequences of which conspiracy and attempt, if successfully carried out, would be to obstruct, delay and adversely affect interstate commerce in any way or degree, the offense charged in the indictment of conspiracy and attempt would be complete, and the jury could properly convict all defendants found beyond

it emphasized this fact to the jury immediately before it retired. *Supra*, at 654. We cannot assume that the jury disregarded these clear and unambiguous instructions and returned a guilty verdict without first finding that the Government had proved both crimes charged in the indictment beyond a reasonable doubt. *E. g., Shotwell Mfg. Co.* v. *United States*, 371 U. S. 341, 367 (1963). We are therefore satisfied that the jury did not acquit petitioners of the conspiracy charge; consequently, the Double Jeopardy Clause does not preclude their retrial for that crime. *E. g., North Carolina* v. *Pearce*, 395 U. S. 711, 719–720 (1969); *United States* v. *Tateo*, 377 U. S. 463 (1964).

Accordingly, the judgment of the Court of Appeals is affirmed in part, reversed in part, and remanded.

It is so ordered.

MR. JUSTICE WHITE concurs in the judgment.

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a reasonable doubt to be members of the conspiracy and attempt." Tr. 10–25.

"[I]t becomes necessary for me to define both 'conspiracy' and 'attempt,' since the defendants are charged not with the substantive offense itself of obstructing, delaying or adversely affecting interstate commerce by extortion but rather a conspiracy and attempt so to do.

"Therefore, I shall define to you all of the requisites of both a conspiracy and an attempt, because all of these requisites must be found before the jury could find any defendant guilty." *Id.*, at 10–25—10–26.

"In this case the defendants are charged with a conspiracy and attempt, both as integral and essential parts of the single charge." *Id.*, at 10–35.

"[T]his charge being a single conspiracy and attempt to obstruct, delay and adversely or harmfully affect interstate commerce by extortion does not require proof that the conspiracy was successful, or that its unlawful objectives were obtained. The offense charged may be proved even though the conspiracy and attempt failed because the extortion was not successfully carried out." *Id.*, at 10–39.

STENCEL AERO ENGINEERING CORP. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 76-321. Argued March 22, 1977—Decided June 9, 1977

A National Guard officer was permanently injured when the ejection system of his fighter aircraft malfunctioned during a midair emergency. Although he was awarded a lifetime pension under the Veterans' Benefits Act for the injury, he brought a damages suit against, *inter alia*, the United States and petitioner, which had manufactured the ejection system pursuant to Government specifications and with components furnished by the Government. The serviceman claimed that the ejection system had malfunctioned as a result of the defendants' individual and joint negligence. Petitioner cross-claimed against the United States, alleging that any malfunction in the system was due to faulty Government specifications and components. The District Court granted the Government's motions for summary judgment against the officer and for dismissal of petitioner's cross-claim, on the ground that *Feres* v. *United States*, 340 U. S. 135 (wherein it was held that an on-duty serviceman injured because of Government officials' negligence may not recover against the United States under the Federal Tort Claims Act), barred both the officer's claim and petitioner's claim. *Held:* Petitioner's third-party indemnity claim cannot be maintained. *Feres* v. *United States*, *supra*. The right of a third party to recover in an indemnity action against the United States recognized in *United States* v. *Yellow Cab Co.*, 340 U. S. 543, is limited by the rationale of *Feres* where the injured party is a serviceman. Pp. 669-674.

(a) The relationship between the Government and its suppliers of ordnance is as "distinctively federal in character" as the relationship between the Government and members of its Armed Forces, and hence, if as in *Feres* it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the Government's liability to a serviceman for service-connected injuries, it makes equally little sense to permit that situs to affect such liability to a Government contractor for the identical injury. P. 672.

(b) The Veterans' Benefits Act provides an upper limit of liability for the Government as to service-connected injuries, and to permit petitioner's claim would circumvent such limitation. Pp. 672-673.

(c) Where the case concerns an injury to a serviceman while on duty, the adverse effect upon military discipline is identical whether the action is brought by the serviceman directly or by a third party, since in either case the issue would be the degree of the Government agents' fault, if any, and the effect upon the serviceman's safety, and the trial would involve second-guessing military orders. P. 673.

536 F. 2d 765, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 674.

Thomas J. Whalen argued the cause and filed briefs for petitioner.

Thomas S. Martin argued the cause for the United States. With him on the brief were *Acting Solicitor General Friedman* and *Acting Assistant Attorney General Jaffe.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to decide whether the United States is liable under the Federal Tort Claims Act, 28 U. S. C. § 2674, to indemnify a third party for damages paid by it to a member of the Armed Forces injured in the course of military service.

(1)

On June 9, 1973, Captain John Donham was permanently injured when the egress life-support system of his F–100 fighter aircraft malfunctioned during a midair emergency.[1] Petitioner, Stencel Aero Engineering Corp., manufactured the ejection system pursuant to the specifications of, and by use of certain components provided by, the United States.[2] Pursu-

[1] Captain Donham was at the time assigned for training to the 131st Tactical Fighter Group, Missouri Air National Guard.

[2] There is no contractual relationship between the United States and

ant to the Veterans' Benefits Act, 38 U. S. C. § 321 *et seq.*, made applicable to National Guardsmen by 32 U. S. C. § 318, Captain Donham was awarded a lifetime pension of approximately $1,500 per month. He nonetheless brought suit for the injury in the Eastern District of Missouri claiming damages of $2,500,000. Named as defendants, *inter alia*, were the United States and Stencel. Donham alleged that the emergency eject system malfunctioned as a result of "the negligence and carelessness of the defendants individually and jointly."

Stencel then cross-claimed against the United States for indemnity, charging that any malfunction in the egress life-support system used by Donham was due to faulty specifications, requirements, and components provided by the United States or other persons under contract with the United States. The cross-claim further charged that the malfunctioning system had been in the exclusive custody and control of the United States since the time of its manufacture. Stencel therefore claimed that, insofar as it was negligent at all, its negligence was passive, while the negligence of the United States was active. Accordingly it prayed for indemnity as to any sums it would be required to pay to Captain Donham.[3]

The United States moved for summary judgment against Donham, contending that he could not recover under the Tort Claims Act against the Government for injuries sustained incident to military service. *Feres* v. *United States*, 340 U. S.

Stencel. Stencel contracted with North American Rockwell, the prime Government contractor, to provide the F–100's pilot eject system.

[3] Stencel's indemnity claim is based upon the law of Missouri. See, *e. g.*, *Feinstein* v. *Edward Livington & Sons, Inc.*, 457 S. W. 2d 789, 792–793 (Mo. 1970); *Kansas City Southern R. Co.* v. *Payway Feed Mills, Inc.*, 338 S. W. 2d 1 (Mo. 1960). The FTCA, of course, insofar as it is applicable, fixes the liability of the United States with reference to "the law of the place where the [wrongful] act or omission occurred." 28 U. S. C. § 1346 (b).

135 (1950). The United States further moved for dismissal of Stencel's cross-claim, asserting that *Feres* also bars an indemnity action by a third party for monies paid to military personnel who could not recover directly from the United States.

The District Court granted the Government's motions, holding that *Feres* protected the United States both from the claim of the serviceman and that of the third party.[4] Both claims were therefore dismissed for lack of subject-matter jurisdiction. Stencel appealed this ruling to the Court of Appeals for the Eighth Circuit[5] and that court affirmed. 536 F. 2d 765. We granted certiorari.[6] 429 U. S. 958.

(2)

In *Feres* v. *United States, supra,* the Court held that an on-duty serviceman who is injured due to the negligence of Government officials may not recover against the United States under the Federal Tort Claims Act. During the same Term, in a case involving injuries to private parties, the Court also held that the Act permits impleading the Government as a third-party defendant, under a theory of indemnity or contribution, if the original defendant claims that the United

[4] Still pending in the District Court is Donham's action against Stencel and against Mills Manufacturing Corp., another alleged tortfeasor.

[5] The District Court had properly certified its judgment as final pursuant to Fed. Rule Civ. Proc. 54 (b), thereby making immediate appeal by Stencel appropriate.

[6] The Circuits have been far from uniform in their treatment of this issue. The view taken by the Eighth Circuit in this case was first adopted by the Ninth Circuit in *United Air Lines, Inc.* v. *Wiener,* 335 F. 2d 379, 404, cert. dismissed, 379 U. S. 951 (1964), and has been recently reaffirmed in *Adams* v. *General Dynamics Corp.,* 535 F. 2d 489, 491 (1976), cert. pending, No. 76-220. Positions which appear inconsistent with this view have been adopted by the Tenth Circuit in *Barr* v. *Brezina Constr. Co.,* 464 F. 2d 1141, 1143–1144 (1972), cert. denied, 409 U. S. 1125 (1973), and by the Fifth Circuit in *Certain Underwriters at Lloyd's* v. *United States,* 511 F. 2d 159, 163 (1975).

States was wholly or partially responsible for the plaintiff's injury. *United States* v. *Yellow Cab Co.*, 340 U. S. 543 (1951). In this case we must resolve the tension between *Feres* and *Yellow Cab* when a member of the Armed Services brings a tort action against a private defendant and the latter seeks indemnity from the United States under the Tort Claims Act, claiming that Government officials were primarily responsible for the injuries.

Petitioner argues that "[t]he Federal Tort Claims Act waives the Government's immunity from suit in sweeping language." *United States* v. *Yellow Cab Co., supra,* at 547. Petitioner therefore contends that, unless its claim falls within one of the express exceptions to the Act, the Court should give effect to the congressional policy underlying the Act, which is to hold the United States liable under state-law principles to the same extent as a similarly situated private individual. However, the principles of *Yellow Cab* here come into conflict with the equally well established doctrine of *Feres* v. *United States.* It is necessary, therefore, to examine the rationale of *Feres* to determine to what extent, if any, allowance of petitioner's claim would circumvent the purposes of the Act as there construed by the Court.

Feres was an action by the executrix of a serviceman who had been killed when the barracks in which he was sleeping caught fire. The plaintiff claimed that the United States had been negligent in quartering the decedent in barracks it knew to be unsafe due to a defective heating plant.[7] While recognizing the broad congressional purpose in passing the Act, the Court noted that the relationship between a sovereign and the members of its Armed Forces is unlike any relationship between private individuals. 340 U. S., at 141–142. There

[7] The Court considered two additional cases involving alleged negligence of army officials. *Jefferson* v. *United States,* O. T. 1950, No. 29, and *United States* v. *Griggs,* O. T. 1950, No. 31. It is unnecessary, for present purposes, to detail the fact situations involved in these two cases.

is thus at least a surface anomaly in applying the mandate of the Act that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U. S. C. § 2674. Noting that the effect of the Act was "to waive immunity from recognized causes of action and . . . not to visit the Government with novel and unprecedented liabilities," 340 U. S., at 142, the Court concluded:

> "[T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command." *Id.*, at 146.

In reaching this conclusion, the Court considered two factors: First, the relationship between the Government and members of its Armed Forces is " 'distinctively federal in character,' " *id.*, at 143, citing *United States* v. *Standard Oil Co.*, 332 U. S. 301 (1947); it would make little sense to have the Government's liability to members of the Armed Services dependent on the fortuity of where the soldier happened to be stationed at the time of the injury. Second, the Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory "no fault" compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government. A third factor was explicated in *United States* v. *Brown*, 348 U. S. 110, 112 (1954), namely, "[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain

if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . . ." We must therefore consider the impact of these factors where, as here, the suit against the Government is not brought by the serviceman himself, but by a third party seeking indemnity for any damages it may be required to pay the serviceman.

Clearly, the first factor considered in *Feres* operates with equal force in this case. The relationship between the Government and its suppliers of ordnance is certainly no less "distinctively federal in character" than the relationship between the Government and its soldiers. The Armed Services perform a unique, nationwide function in protecting the security of the United States. To that end military authorities frequently move large numbers of men, and large quantities of equipment, from one end of the continent to the other, and beyond. Significant risk of accidents and injuries attend such a vast undertaking. If, as the Court held in *Feres*, it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to a serviceman who sustains service-connected injuries, 340 U. S., at 143, it makes equally little sense to permit that situs to affect the Government's liability to a Government contractor for the identical injury.

The second factor considered by *Feres* is somewhat more difficult to apply. Petitioner argues that the existence of a generous military compensation scheme (from which Captain Donham has benefited and will continue to benefit, *supra*, at 667–668) is of little comfort to it. It is contended that, although it may be fair to prohibit direct recovery by servicemen under the Act, since they are assured of compensation regardless of fault under the Veterans' Benefits Act, petitioner as a third-party claimant should not be barred from indemnity for damages which it may be required to pay to the serviceman, and as to which it has no alternative federal remedy.

A compensation scheme such as the Veterans' Benefits Act serves a dual purpose: it not only provides a swift, efficient remedy for the injured serviceman, but it also clothes the Government in the "protective mantle of the Act's limitation-of-liability provisions." See *Cooper Stevedoring Co.* v. *Kopke, Inc.*, 417 U. S. 106, 115 (1974). Given the broad exposure of the Government, and the great variability in the potentially applicable tort law, see *Feres*, 340 U. S., at 142–143, the military compensation scheme provides an upper limit of liability for the Government as to service-connected injuries. To permit petitioner's claim would circumvent this limitation, thereby frustrating one of the essential features of the Veterans' Benefits Act. As we stated in a somewhat different context concerning the Tort Claims Act: "To permit [petitioner] to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe that the [Federal Tort Claims] Act permits such a result." *Laird* v. *Nelms*, 406 U. S. 797, 802 (1972).

Turning to the third factor, it seems quite clear that where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party. The litigation would take virtually the identical form in either case, and at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety. The trial would, in either case, involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions. This factor, too, weighs against permitting any recovery by petitioner against the United States.

We conclude, therefore, that the third-party indemnity action in this case is unavailable for essentially the same reasons that the direct action by Donham is barred by *Feres*.

The factors considered by the *Feres* court are largely applicable in this type of case as well; hence, the right of a third party to recover in an indemnity action against the United States recognized in *Yellow Cab*, must be held limited by the rationale of *Feres* where the injured party is a serviceman. Since the relationship between the United States and petitioner is based on a commercial contract, there is no basis for a claim of unfairness in this result.[8]

Accordingly, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

The opinion of the Court appears to be premised on the theory that in any case involving a member of the military on active duty, *Feres* v. *United States*, 340 U. S. 135 (1950), displaces the plain language of the Tort Claims Act. I cannot agree that that narrow, judicially created exception to the waiver of sovereign immunity contained in the Act should be extended to any category of litigation other than suits against the Government by active-duty servicemen based on injuries incurred while on duty.

Even if *Feres* is not to be strictly limited, I do not agree that its extension to cover this case is justified. The Court's explanation simply does not differentiate this suit by a corporation against the Government from similar suits that the Tort Claims Act does allow. See, *e. g.*, *United States* v. *Yellow Cab Co.*, 340 U. S. 543 (1951).

The first factor relied upon by the Court is the "distinctively federal" relationship between the Government and "its sup-

[8] Since the first Circuit case to hold such actions barred by *Feres* was decided in 1964, see n. 6, *supra*, petitioner no doubt had sufficient notice so as to take this risk into account in negotiating its contract for the emergency eject system at issue here.

pliers of ordnance." *Ante*, at 672. It is true, of course, that the military performs "a unique, nationwide function," *ibid.*, but so do the Bureau of the Census, the Immigration and Naturalization Service, and many other agencies of the Federal Government. These agencies, like the military, may have personnel and equipment in all parts of the country. Nevertheless, Congress has made private rights against the Government depend on "the law of the place where the act or omission occurred," 28 U. S. C. § 1346 (b), and presumably the Court agrees that this provision governs the rights of suppliers to nonmilitary agencies. Nothing in the Court's opinion explains why it concludes that the relationship between the Government and those suppliers differs from its relationship to purveyors of military equipment.

The Court also concludes that compensation payments to an injured serviceman under the Veterans' Benefits Act, 38 U. S. C. § 321 *et seq.*, place an absolute upper limit on the Government's liability for service-connected injuries. Yet, nothing in that Act suggests that it is designed to place on third parties, such as petitioner, the burden of fully compensating injuries to servicemen when the Government is at fault. Indeed, the Veterans' Benefits Act does not even contain an explicit declaration that it is the exclusive remedy against the Government for a serviceman's injury. The comparable compensation program for civilian employees of the Government does contain such a limitation of liability. 5 U. S. C. § 8116 (c).* Yet we have held that the broad language of the exclusivity provision in the civilian compensation

*"The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding,

scheme does not affect "the rights of unrelated third parties," *Weyerhaeuser S. S. Co.* v. *United States*, 372 U. S. 597, 601 (1963), and the lower courts have allowed indemnity suits identical to petitioner's to proceed despite that provision. See, *e. g.*, *Travelers Ins. Co.* v. *United States*, 493 F. 2d 881 (CA3 1974). The Court fails to explain why the absence of an exclusivity provision in the Veterans' Benefits Act forecloses suits by third parties in cases involving injuries to military personnel when the existence of such a clause does not bar similar actions when the injured employee works for one of the Government's civilian agencies.

Finally, the Court claims to find in this action a threat to military discipline. It is clear that the basis of *Feres* was the Court's concern with the disruption of "[t]he peculiar and special relationship of the soldier to his superiors" that might result if the soldier were allowed to hale his superiors into court. See *United States* v. *Brown*, 348 U. S. 110, 112 (1954). That problem does not arise when a nonmilitary third party brings suit.

The majority's argument that whether petitioner or the injured serviceman sues is of no import because the trial would take the same form in either case proves far too much. Had the same malfunction in the pilot eject system that caused the serviceman's injuries here also caused that system to plunge into a civilian's house, the injured civilian would unquestionably have a cause of action under the Tort Claims Act against the Government. He might also sue petitioner, which might, as it has done here, cross-claim against the Government. In that hypothetical case, as well as in the case before us, there would be the same chance that the trial would "involve second-guessing military orders, and would . . . require members of the Armed Services to testify in court as to

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in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. . . ."

each other's decisions and actions." *Ante,* at 673. Yet there would be no basis, in *Feres* or in the Tort Claims Act, for concluding that the suit is barred because of the nature of the evidence to be produced at trial. There is no basis for reaching that conclusion here.

I respectfully dissent.

CAREY, GOVERNOR OF NEW YORK, ET AL. *v.* POPULATION SERVICES INTERNATIONAL ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 75-443. Argued January 10, 1977—Decided June 9, 1977

Section 6811 (8) of the New York Education Law makes it a crime (1) for any person to sell or distribute any contraceptive of any kind to a minor under 16; (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or over; and (3) for anyone, including licensed pharmacists, to advertise or display contraceptives. In appellees' action against appellant state officials challenging the constitutionality of § 6811 (8), a three-judge District Court declared the statute unconstitutional in its entirety under the First and Fourteenth Amendments insofar as it applies to nonprescription contraceptives, and enjoined its enforcement as so applied. *Held:* The judgment is affirmed. Pp. 682-703; 707-708; 713-716.

398 F. Supp. 321, affirmed.

MR. JUSTICE BRENNAN delivered the opinion of the Court with respect to Parts I, II, III, and V, finding that:

1. Appellee Population Planning Associates (PPA), a corporation that makes mail-order sales of nonmedical contraceptive devices from its North Carolina offices and regularly advertises its products in New York periodicals and fills mail orders from New York residents without limiting availability of the products to persons of any particular age, has the requisite standing to maintain the action not only in its own right but also on behalf of its potential customers, *Craig* v. *Boren*, 429 U. S. 190, and therefore there is no occasion to decide the standing of the other appellees. Pp. 682-684.

2. Regulations imposing a burden on a decision as fundamental as whether to bear or beget a child may be justified only by compelling state interests, and must be narrowly drawn to express only those interests. Pp. 684-686.

3. The provision prohibiting distribution of nonmedical contraceptives to persons 16 or over except through licensed pharmacists clearly burdens the right of such individuals to use contraceptives if they so desire, and the provision serves no compelling state interests. It cannot be justified by an interest in protecting health insofar as it applies

to nonhazardous contraceptives or in protecting potential life, nor can it be justified by a concern that young people not sell contraceptives, or as being designed to serve as a quality control device or as facilitating enforcement of the other provisions of the statute. Pp. 686–691.

4. The prohibition of any advertisement or display of contraceptives that seeks to suppress completely any information about the availability and price of contraceptives cannot be justified on the ground that advertisements of contraceptive products would offend and embarrass those exposed to them and that permitting them would legitimize sexual activity of young people. These are classically not justifications validating suppression of expression protected by the First Amendment, and here the advertisements in question merely state the availability of products that are not only entirely legal but constitutionally protected. Pp. 700–702.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, concluded in Part IV that the provision prohibiting distribution of contraceptives to persons under 16, as applied to nonprescription contraceptives, cannot be justified as a permissible regulation of minors' morality in furtherance of the State's policy against promiscuous sexual intercourse among the young. Pp. 691–699.

(a) The right to privacy in connection with decisions affecting procreation extends to minors as well as to adults, and since a State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, *Planned Parenthood of Missouri* v. *Danforth*, 428 U. S. 52, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is *a fortiori* foreclosed. Pp. 693–694.

(b) The argument that sexual activity may be deterred by increasing the hazards attendant on it has been rejected by the Court as a justification for restrictions on the freedom to choose whether to bear or beget a child. *Eisenstadt* v. *Baird*, 405 U. S. 438, 448; *Roe* v. *Wade*, 410 U. S. 113, 148. Moreover, there is substantial doubt whether limiting access to contraceptives will in fact substantially discourage early sexual behavior. When a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some state policy requires more than the unsupported assertion (appellants here having conceded that there is no evidence that teenage extramarital sexual activity increases in proportion to the availability of contraceptives) that the burden is connected to such a policy. Pp. 694–696.

(c) That under another provision of the statute a minor under 16 may be supplied with a contraceptive by a physician does not save the challenged provision, especially where appellants asserted no medical necessity for imposing a limitation on the distribution of nonprescription contraceptives to minors. Pp. 697–699.

MR. JUSTICE WHITE concluded that the prohibition against distribution of contraceptives to persons under 16 cannot be justified primarily because the State has not demonstrated that such prohibition measurably contributes to the deterrent purposes that the State advances as justification. Pp. 702–703.

MR. JUSTICE POWELL concluded that the prohibition against distribution of contraceptives to persons under 16 is defective both because it infringes the privacy interests of married females between the ages of 14 and 16 and because it prohibits parents from distributing contraceptives to their children, thus unjustifiably interfering with parental interests in rearing children. Pp. 707–708.

MR. JUSTICE STEVENS concluded that the prohibition against distribution of contraceptives to persons under 16 denies such persons and their parents a choice which, if available, would reduce exposure to venereal disease or unwanted pregnancy, and that the prohibition cannot be justified as a means of discouraging sexual activity by minors. Pp. 713–716.

BRENNAN, J., announced the Court's judgment and delivered an opinion of the Court (Parts I, II, III, and V), in which STEWART, MARSHALL, BLACKMUN, and STEVENS, JJ., joined; in all but Part II of which WHITE, J., joined; and in Part I of which POWELL, J., joined; and an opinion (Part IV), in which STEWART, MARSHALL, and BLACKMUN, JJ., joined. WHITE, J., *post*, p. 702, POWELL, J., *post*, p. 703, and STEVENS, J., *post*, p. 712, filed opinions concurring in part and concurring in the judgment. BURGER, C. J., dissented. REHNQUIST, J., filed a dissenting opinion, *post*, p. 717.

Arlene R. Silverman, Assistant Attorney General of New York, argued the cause for appellants. With her on the briefs were *Louis J. Lefkowitz*, Attorney General, and *Samuel A. Hirshowitz*, First Assistant Attorney General.

Michael N. Pollet argued the cause for appellees. With him on the brief was *Steven Delibert*.*

*Briefs of *amici curiae* urging affirmance were filed by *Melvin L. Wulf*,

MR. JUSTICE BRENNAN delivered the opinion of the Court (Parts I, II, III, and V), together with an opinion (Part IV), in which MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN joined.

Under New York Educ. Law § 6811 (8) (McKinney 1972) it is a crime (1) for any person to sell or distribute any contraceptive of any kind to a minor under the age of 16 years; (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or over; and (3) for anyone, including licensed pharmacists, to advertise or display contraceptives.[1] A three-judge District Court for the Southern District of New York declared § 6811 (8) unconstitutional in its entirety under the First and Fourteenth Amendments of the

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Judith M. Mears, and *Rena Uviller* for the American Civil Liberties Union; and by *Harriet F. Pilpel* and *Eve W. Paul* for the Planned Parenthood Federation of America et al.

[1] Section 6811 (8) provides:

"It shall be a class A misdemeanor for:

. . . . . .

"8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of contraception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy, is hereby prohibited."

After some dispute in the District Court the parties apparently now agree that Education Law § 6807 (b) (McKinney 1972) constitutes an exception to the distribution prohibitions of § 6811 (8). Section 6807 (b) provides:

"This article shall not be construed to affect or prevent:

. . . . . .

"(b) Any physician . . . who is not the owner of a pharmacy, or registered store, or who is not in the employ of such owner, from supplying his patients with such drugs as the physician . . . deems proper in connection with his practice . . . ."

The definition of "drugs" in Education Law § 6802 (7) (McKinney 1972) apparently includes any contraceptive drug or device. See nn. 7, 13, and 23, and text, *infra*, at 697–699. See also 398 F. Supp. 321, 329–330, and n. 8.

Federal Constitution insofar as it applies to nonprescription contraceptives, and enjoined its enforcement as so applied. 398 F. Supp. 321 (1975). We noted probable jurisdiction, 426 U. S. 918 (1976). We affirm.

I

We must address a preliminary question of the standing of the various appellees to maintain the action. We conclude that appellee Population Planning Associates, Inc. (PPA) has the requisite standing and therefore have no occasion to decide the standing of the other appellees.[2]

PPA is a corporation primarily engaged in the mail-order retail sale of nonmedical contraceptive devices from its offices in North Carolina. PPA regularly advertises its products in periodicals published or circulated in New York, accepts orders from New York residents, and fills orders by mailing contraceptives to New York purchasers. Neither the advertisements nor the order forms accompanying them limit availability of PPA's products to persons of any particular age.

Various New York officials have advised PPA that its activities violate New York law. A letter of December 1, 1971, notified PPA that a PPA advertisement in a New York college newspaper violated § 6811 (8), citing each of the three challenged provisions, and requested "future compliance" with the

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[2] In addition to PPA, the plaintiffs in the District Court, appellees here, are Population Services International, a nonprofit corporation disseminating birth control information and services; Rev. James B. Hagen, a minister and director of a venereal disease prevention program that distributes contraceptive devices; three physicians specializing in family planning, pediatrics, and obstetrics-gynecology; and an adult New York resident who alleges that the statute inhibits his access to contraceptive devices and information, and his freedom to distribute the same to his minor children. The District Court held that PPA and Hagen had standing, and therefore found it unnecessary to decide the standing of the other plaintiffs. *Id.*, at 327–330.

The appellants here, defendants in the District Court, are state officials responsible for the enforcement of the Education Law provisions.

law. A second letter, dated February 23, 1973, notifying PPA that PPA's magazine advertisements of contraceptives violated the statute, referred particularly to the provisions prohibiting sales to minors and sales by nonpharmacists, and threatened: "In the event you fail to comply, the matter will be referred to our Attorney General for legal action." Finally, PPA was served with a copy of a report of inspectors of the State Board of Pharmacy, dated September 4, 1974, which recorded that PPA advertised male contraceptives, and had been advised to cease selling contraceptives in violation of the state law.

That PPA has standing to challenge § 6811 (8), not only in its own right but also on behalf of its potential customers, is settled by *Craig* v. *Boren*, 429 U. S. 190, 192–197 (1976). *Craig* held that a vendor of 3.2% beer had standing to challenge in its own right and as advocate for the rights of third persons, the gender-based discrimination in a state statute that prohibited sale of the beer to men, but not to women, between the ages of 18 and 21. In this case, as did the statute in *Craig*, § 6811 (8) inflicts on the vendor PPA "injury in fact" that satisfies Art. III's case-or-controversy requirement, since "[t]he legal duties created by the statutory sections under challenge are addressed directly to vendors such as [PPA. It] is obliged either to heed the statutory [prohibition], thereby incurring a direct economic injury through the constriction of [its] market, or to disobey the statutory command and suffer" legal sanctions. 429 U. S., at 194.[3] There-

[3] Appellants contend that PPA has not suffered "injury in fact" because it has not shown that prosecution under § 6811 (8) is imminent. *Steffel* v. *Thompson*, 415 U. S. 452, 459–460 (1974) is dispositive of this argument. PPA alleges that it has violated the challenged statute in the past, and continues to violate it in the regular course of its business; that it has been advised by the authorities responsible for enforcing the statute that it is in violation; and that on at least one occasion, it has been threatened with prosecution. The threat is not, as in *Poe* v. *Ullman*, 367 U. S. 497, 508 (1961) (plurality opinion), "chimerical." In that

fore, PPA is among the "vendors and those in like positions [who] have been uniformly permitted to resist efforts at restricting their operations by acting as advocates for the rights of third parties who seek access to their market or function." *Id.*, at 195. See also *Eisenstadt* v. *Baird*, 405 U. S. 438, 443–446 (1972); *Sullivan* v. *Little Hunting Park*, 396 U. S. 229, 237 (1969); *Barrows* v. *Jackson*, 346 U. S. 249, 257–260 (1953). As such, PPA "is entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should [its] constitutional challenge fail." *Craig* v. *Boren*, *supra*, at 195, quoting *Griswold* v. *Connecticut*, 381 U. S. 479, 481 (1965).[4]

II

Although "[t]he Constitution does not explicitly mention any right of privacy," the Court has recognized that one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is "a right of personal privacy, or a guarantee of certain areas or zones of privacy." *Roe* v. *Wade*, 410 U. S. 113, 152 (1973). This right of personal privacy includes "the interest in independence in making certain kinds of important decisions." *Whalen* v. *Roe*, 429 U. S. 589, 599–600 (1977). While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among

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case, the challenged state law had fallen into virtual desuetude through lack of prosecution over some 80 years, and plaintiffs alleged no explicit threat of prosecution. Here, PPA has been threatened with legal action, and prosecutions have been brought under the predecessor of § 6811 (8) as recently as 1965. See, *e. g.*, *People* v. *Baird*, 47 Misc. 2d 478, 262 N. Y. S. 2d 947 (1965).

[4] Indeed, the case for the vendor's standing to assert the rights of potential purchasers of his product is even more compelling here than in *Craig*, because the rights involved fall within the sensitive area of personal privacy. In such a case potential purchasers "may be chilled from . . . assertion [of their own rights] by a desire to protect the very privacy [they seek to vindicate] from the publicity of a court suit." *Singleton* v. *Wulff*, 428 U. S. 106, 117 (1976).

the decisions that an individual may make without unjustified government interference are personal decisions "relating to marriage, *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967); procreation, *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541–542 (1942); contraception, *Eisenstadt* v. *Baird*, 405 U. S., at 453–454; *id.*, at 460, 463–465 (WHITE, J., concurring in result); family relationships, *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944); and child rearing and education, *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925); *Meyer* v. *Nebraska*, [262 U. S. 390, 399 (1923)]." *Roe* v. *Wade*, *supra*, at 152–153. See also *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 639–640 (1974).

The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy, a right first explicitly recognized in an opinion holding unconstitutional a statute prohibiting the use of contraceptives, *Griswold* v. *Connecticut*, *supra*, and most prominently vindicated in recent years in the contexts of contraception, *Griswold* v. *Connecticut*, *supra*; *Eisenstadt* v. *Baird*, *supra*; and abortion, *Roe* v. *Wade*, *supra*; *Doe* v. *Bolton*, 410 U. S. 179 (1973); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976). This is understandable, for in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive. "If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt* v. *Baird*, *supra*, at 453. (Emphasis omitted.)

That the constitutionally protected right of privacy extends to an individual's liberty to make choices regarding contraception does not, however, automatically invalidate every state

regulation in this area. The business of manufacturing and selling contraceptives may be regulated in ways that do not infringe protected individual choices. And even a burdensome regulation may be validated by a sufficiently compelling state interest. In *Roe* v. *Wade*, for example, after determining that the "right of privacy . . . encompass[es] a woman's decision whether or not to terminate her pregnancy," 410 U. S., at 153, we cautioned that the right is not absolute, and that certain state interests (in that case, "interests in safeguarding health, in maintaining medical standards, and in protecting potential life") may at some point "become sufficiently compelling to sustain regulation of the factors that govern the abortion decision." *Id.*, at 154. "Compelling" is of course the key word; where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests. *Id.*, at 155–156, and cases there cited.

With these principles in mind, we turn to the question whether the District Court was correct in holding invalid the provisions of § 6811 (8) as applied to the distribution of nonprescription contraceptives.

III

We consider first the wider restriction on access to contraceptives created by § 6811 (8)'s prohibition of the distribution of nonmedical contraceptives to adults except through licensed pharmacists.

Appellants argue that this Court has not accorded a "right of access to contraceptives" the status of a fundamental aspect of personal liberty. They emphasize that *Griswold* v. *Connecticut* struck down a state prohibition of the *use* of contraceptives, and so had no occasion to discuss laws "regulating their manufacture or sale." 381 U. S., at 485. *Eisenstadt* v. *Baird*, was decided under the Equal Protection Clause, holding that "whatever the rights of the individual to access to contra-

ceptives may be, the rights must be the same for the unmarried and the married alike." 405 U. S., at 453. Thus appellants argue that neither case should be treated as reflecting upon the State's power to limit or prohibit distribution of contraceptives to any persons, married or unmarried. But see *id.*, at 463–464 (WHITE, J., concurring in result).

The fatal fallacy in this argument is that it overlooks the underlying premise of those decisions that the Constitution protects "the right of the individual . . . to be free from unwarranted governmental intrusion into . . . the decision whether to bear or beget a child." *Id.*, at 453. *Griswold* did state that by "forbidding the *use* of contraceptives rather than regulating their manufacture or sale," the Connecticut statute there had "a maximum destructive impact" on privacy rights. 381 U. S., at 485. This intrusion into "the sacred precincts of marital bedrooms" made that statute particularly "repulsive." *Id.*, at 485–486. But subsequent decisions have made clear that the constitutional protection of individual autonomy in matters of childbearing is not dependent on that element. *Eisenstadt* v. *Baird*, holding that the protection is not limited to married couples, characterized the protected right as the "*decision* whether to bear or beget a child." 405 U. S., at 453 (emphasis added). Similarly, *Roe* v. *Wade*, held that the Constitution protects "a woman's *decision* whether or not to terminate her pregnancy." 410 U. S., at 153 (emphasis added). See also *Whalen* v. *Roe*, *supra*, at 599–600, and n. 26. These decisions put *Griswold* in proper perspective. *Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.

Restrictions on the distribution of contraceptives clearly burden the freedom to make such decisions. A total prohibition against sale of contraceptives, for example, would intrude

upon individual decisions in matters of procreation and contraception as harshly as a direct ban on their use. Indeed, in practice, a prohibition against all sales, since more easily and less offensively enforced, might have an even more devastating effect upon the freedom to choose contraception. Cf. *Poe* v. *Ullman*, 367 U. S. 497 (1961).

An instructive analogy is found in decisions after *Roe* v. *Wade*, *supra*, that held unconstitutional statutes that did not prohibit abortions outright but limited in a variety of ways a woman's access to them. *Doe* v. *Bolton*, 410 U. S. 179 (1973); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976). See also *Bigelow* v. *Virginia*, 421 U. S. 809 (1975). The significance of these cases is that they establish that the same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely. Both types of regulation "may be justified only by a 'compelling state interest' . . . and . . . must be narrowly drawn to express only the legitimate state interests at stake." *Roe* v. *Wade*, *supra*, at 155.[5] See also *Eisenstadt* v. *Baird*, 405 U. S., at 463 (WHITE, J., concurring in result). This is so not because there is an independent fundamental "right of access to contraceptives," but because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the

[5] Contrary to the suggestion advanced in MR. JUSTICE POWELL's opinion, we do not hold that state regulation must meet this standard "whenever it implicates sexual freedom," *post*, at 705, or "affect[s] adult sexual relations," *post*, at 703, but only when it "burden[s] an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision." *Supra*, this page. As we observe below, "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults," n. 17, *infra*, and we do not purport to answer that question now.

underlying foundation of the holdings in *Griswold*, *Eisenstadt* v. *Baird*, and *Roe* v. *Wade*.

Limiting the distribution of nonprescription contraceptives to licensed pharmacists clearly imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so. *Eisenstadt* v. *Baird*, *supra*, at 461–464 (WHITE, J., concurring in result). The burden is, of course, not as great as that under a total ban on distribution. Nevertheless, the restriction of distribution channels to a small fraction of the total number of possible retail outlets renders contraceptive devices considerably less accessible to the public, reduces the opportunity for privacy of selection and purchase,[6] and lessens the possibility of price competition.[7] Cf. *Griswold* v. *Connecticut*, 381 U. S., at 503 (WHITE, J., concurring in judgment). Of particular relevance here is *Doe* v. *Bolton*, *supra*, in which the Court struck down, as unconstitutionally burdening the right of a woman to choose abortion, a statute requiring that abortions be performed only in accredited hospitals, in the absence of proof that the requirement was substantially related to the State's interest in protecting the patient's health. 410 U. S., at 193–195. The same infirmity infuses the limitation in § 6811 (8). "Just as in *Griswold*, where the right of married persons to use contraceptives was 'diluted or adversely affected' by permitting a

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[6] As MR. JUSTICE POWELL notes, *post*, at 711, the prohibition of mail-order sales of contraceptives, as practiced by PPA, is a particularly "significant invasion of the constitutionally protected privacy in decisions concerning sexual relations."

[7] The narrow exception to § 6811 (8) arguably provided by New York Educ. Law § 6807 (b) (McKinney, Supp. 1976–1977), see n. 1, *supra*, which permits a physician "who is not the owner of a pharmacy, or registered store" to supply his patients with "such drugs as [he] . . . deems proper in connection with his practice" obviously does not significantly expand the number of regularly available, easily accessible retail outlets for nonprescription contraceptives, and so has little relevance to our analysis of this aspect of § 6811 (8).

conviction for giving advice as to its exercise, . . . so here, to sanction a medical restriction upon distribution of a contraceptive not proved hazardous to health would impair the exercise of the constitutional right." *Eisenstadt* v. *Baird*, 405 U. S., at 464 (WHITE, J., concurring in result).

There remains the inquiry whether the provision serves a compelling state interest. Clearly "interests . . . in maintaining medical standards, and in protecting potential life," *Roe* v. *Wade*, 410 U. S., at 154, cannot be invoked to justify this statute. Insofar as § 6811 (8) applies to nonhazardous contraceptives,[8] it bears no relation to the State's interest in protecting health. *Eisenstadt* v. *Baird*, *supra*, at 450–452; 463–464 (WHITE, J., concurring in result).[9] Nor is the interest in protecting potential life implicated in state regulation of contraceptives. *Roe* v. *Wade*, *supra*, at 163-164.

Appellants therefore suggest that § 6811 (8) furthers other state interests. But none of them is comparable to those the Court has heretofore recognized as compelling. Appellants argue that the limitation of retail sales of nonmedical contraceptives to pharmacists (1) expresses "a proper concern that young people not sell contraceptives"; (2) "allows purchasers to inquire as to the relative qualities of the varying products and prevents anyone from tampering with them"; and (3) facilitates enforcement of the other provisions of the statute. Brief for Appellants 14. The first hardly can justify the statute's incursion into constitutionally protected rights, and

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[8] We have taken judicial notice that "not all contraceptives are potentially dangerous." *Eisenstadt* v. *Baird*, 405 U. S., 438, 451, and n. 9 (1972). See also *id.*, at 463–464 (WHITE, J., concurring in result).

[9] Indeed, in light of other provisions of both federal and state law that comprehensively regulate hazardous drugs and devices, see, *e. g.*, 21 U. S. C. §§ 351–360, especially § 353 (b); N. Y. Educ. Law §§ 6800–6826 (McKinney 1972 and Supp. 1976–1977), especially § 6810, it is unclear what health-related interest the State could have in nonprescription contraceptives. *Eisenstadt* v. *Baird*, *supra*, at 452.

in any event the statute is obviously not substantially related to any goal of preventing young people from selling contraceptives.[10] Nor is the statute designed to serve as a quality control device. Nothing in the record suggests that pharmacists are particularly qualified to give advice on the merits of different nonmedical contraceptives, or that such advice is more necessary to the purchaser of contraceptive products than to consumers of other nonprescription items. Why pharmacists are better able or more inclined than other retailers to prevent tampering with prepackaged products, or, if they are, why contraceptives are singled out for this special protection, is also unexplained.[11] As to ease of enforcement, the prospect of additional administrative inconvenience has not been thought to justify invasion of fundamental constitutional rights. See, *e. g.*, *Morrissey* v. *Brewer*, 408 U. S. 471 (1972); *Goldberg* v. *Kelly*, 397 U. S. 254 (1970).

IV[12]

A

The District Court also held unconstitutional, as applied to nonprescription contraceptives, the provision of § 6811 (8) prohibiting the distribution of contraceptives to those under

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[10] Nothing in New York law limits the employment of minors who work as sales clerks in pharmacies. To the extent that minors employed in other retail stores selling contraceptive products might be exposed "to undesirable comments and gestures," Brief for Appellants 3–4, or otherwise corrupted by exposure to such products, minors working as sales clerks in pharmacies are exposed to the same hazards.

[11] As the District Court pointed out, while these interests are insufficient to justify limiting the distribution of nonhazardous contraceptives to pharmacists, other restrictions may well be reasonably related to the objective of quality control. We therefore express no opinion on, for example, restrictions on the distribution of contraceptives through vending machines, which are not before us in this case. See 398 F. Supp., at 336.

[12] This part of the opinion expresses the views of JUSTICES BRENNAN, STEWART, MARSHALL, and BLACKMUN.

16 years of age.[13] Appellants contend that this provision of the statute is constitutionally permissible as a regulation of the morality of minors, in furtherance of the State's policy against promiscuous sexual intercourse among the young.

The question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer. We have been reluctant to attempt to define "the totality of the relationship of the juvenile and the state." *In re Gault*, 387 U. S. 1, 13 (1967). Certain principles, however, have been recognized. "Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S., at 74. "[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault, supra*, at 13.[14] On the other hand, we have held in a variety of contexts that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." *Prince* v. *Massachusetts*, 321 U. S. 158, 170 (1944). See *Ginsberg* v. *New York*, 390 U. S. 629 (1968). See also *McKeiver* v. *Pennsylvania*, 403 U. S. 528 (1971).

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[13] Subject to an apparent exception for distribution by physicians in the course of their practice. See n. 1, *supra*, and *infra*, at 697–699, and n. 23.

[14] Thus minors are entitled to constitutional protection for freedom of speech, *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969); *West Virginia Bd. of Education* v. *Barnette*, 319 U. S. 624 (1943); equal protection against racial discrimination, *Brown* v. *Board of Education*, 347 U. S. 483 (1954); due process in civil contexts, *Goss* v. *Lopez*, 419 U. S. 565 (1975); and a variety of rights of defendants in criminal proceedings, including the requirement of proof beyond a reasonable doubt, *In re Winship*, 397 U. S. 358 (1970), the prohibition of double jeopardy, *Breed* v. *Jones*, 421 U. S. 519 (1975), the rights to notice, counsel, confrontation, and cross-examination, and not to incriminate oneself, *In re Gault*, 387 U. S. 1 (1967), and the protection against coerced confessions, *Gallegos* v. *Colorado*, 370 U. S. 49 (1962); *Haley* v. *Ohio*, 332 U. S. 596 (1948).

Of particular significance to the decision of this case, the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults. *Planned Parenthood of Central Missouri* v. *Danforth, supra,* held that a State "may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy." 428 U. S., at 74. As in the case of the spousal-consent requirement struck down in the same case, *id.*, at 67–72, "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto," *id.*, at 74, "'which the state itself is absolutely and totally prohibited from exercising.'" *Id.*, at 69. State restrictions inhibiting privacy rights of minors are valid only if they serve "any significant state interest . . . that is not present in the case of an adult." *Id.*, at 75.[15] *Planned Parenthood* found that no such interest justified a state requirement of parental consent.[16]

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[15] This test is apparently less rigorous than the "compelling state interest" test applied to restrictions on the privacy rights of adults. See, *e. g.*, n. 16, *infra.* Such lesser scrutiny is appropriate both because of the States' greater latitude to regulate the conduct of children, *Prince* v. *Massachusetts,* 321 U. S. 158 (1944); *Ginsberg* v. *New York,* 390 U. S. 629 (1968), and because the right of privacy implicated here is "the interest in independence in making certain kinds of important decisions," *Whalen* v. *Roe,* 429 U. S. 589, 599–600 (1977), and the law has generally regarded minors as having a lesser capability for making important decisions. See, *e. g., Planned Parenthood,* 428 U. S., at 102 (STEVENS, J., concurring in part and dissenting in part).

[16] *Planned Parenthood,* however, "does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy. See *Bellotti* v. *Baird,* [428 U. S. 132 (1976)]. The fault of [the particular statute considered in *Planned Parenthood*] is that it imposes a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy . . . without a sufficient justification for the restriction." *Id.*, at 75.

Since the State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is *a fortiori* foreclosed. The State's interests in protection of the mental and physical health of the pregnant minor, and in protection of potential life are clearly more implicated by the abortion decision than by the decision to use a nonhazardous contraceptive.

Appellants argue, however, that significant state interests are served by restricting minors' access to contraceptives, because free availability to minors of contraceptives would lead to increased sexual activity among the young, in violation of the policy of New York to discourage such behavior.[17] The argument is that minors' sexual activity may be deterred by increasing the hazards attendant on it. The same argument, however, would support a ban on abortions for minors, or indeed support a prohibition on abortions, or access to contraceptives, for the unmarried, whose sexual activity is also against the public policy of many States. Yet, in each of these areas, the Court has rejected the argument, noting in *Roe* v. *Wade*, that "no court or commentator has taken the argument seriously." 410

[17] Appellees argue that the State's policy to discourage sexual activity of minors is itself unconstitutional, for the reason that the right to privacy comprehends a right of minors as well as adults to engage in private consensual sexual behavior. We observe that the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating such behavior among adults. See generally Note, On Privacy: Constitutional Protection for Personal Liberty, 48 N. Y. U. L. Rev. 670, 719–738 (1973). But whatever the answer to that question, *Ginsberg* v. *New York*, *supra*, indicates that in the area of sexual mores, as in other areas, the scope of permissible state regulation is broader as to minors than as to adults. In any event, it is unnecessary to pass upon this contention of appellees, and our decision proceeds on the assumption that the Constitution does not bar state regulation of the sexual behavior of minors.

U. S., at 148. The reason for this unanimous rejection was stated in *Eisenstadt* v. *Baird:* "It would be plainly unreasonable to assume that [the State] has prescribed pregnancy and the birth of an unwanted child [or the physical and psychological dangers of an abortion] as punishment for fornication." 405 U. S., at 448. We remain reluctant to attribute any such "scheme of values" to the State.[18]

Moreover, there is substantial reason for doubt whether limiting access to contraceptives will in fact substantially discourage early sexual behavior. Appellants themselves conceded in the District Court that "there is no evidence that teenage extramarital sexual activity increases in proportion to the availability of contraceptives," 398 F. Supp., at 332, and n. 10, and accordingly offered none, in the District Court or here. Appellees, on the other hand, cite a considerable body of evidence and opinion indicating that there is no such deterrent effect.[19] Although we take judicial notice, as did the

[18] We note, moreover, that other provisions of New York law argue strongly against any conclusion that the deterrence of illegal sexual conduct among minors was an objective of § 6811 (8). First, a girl in New York may marry as young as 14, with the consent of her parents and a family court judge. N. Y. Dom. Rel. Law §§ 15–a, 15 (2), 15 (3) (McKinney 1964 and Supp. 1976–1977). Yet although sexual intercourse by a married woman of that age violates no state law, § 6811 (8) prohibits distribution of contraceptives to her. Second, New York requires that birth control information and services be provided to recipients of certain welfare programs, provided only that they are "of childbearing age, including children who can be considered sexually active." N. Y. Soc. Serv. Law § 350 (1) (e) (McKinney 1976); cf. 42 U. S. C. § 602 (a) (15) (A) (1970 ed., Supp. V). See also N. Y. Soc. Serv. Law § 365–a (3) (c) (McKinney 1976); cf. 42 U. S. C. § 1396d (a) (vii) (4) (C) (1970 ed., Supp. V). Although extramarital intercourse is presumably as contrary to state policy among minors covered by those programs as among others, state law requires distribution of contraceptives to them and prohibits their distribution to all others.

[19] See, *e. g.*, Settlage, Baroff, & Cooper, Sexual Experience of Younger Teenage Girls Seeking Contraceptive Assistance for the First Time, Family Planning Perspectives 223 (fall 1973); Pilpel & Wechsler, Birth Control,

District Court, *id.*, at 331–333, that with or without access to contraceptives, the incidence of sexual activity among minors is high,[20] and the consequences of such activity are frequently devastating,[21] the studies cited by appellees play no part in our decision. It is enough that we again confirm the principle that when a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.[22]

Teenagers and the Law: A New Look 1971, Family Plannning Perspectives 37 (July 1971); Stein, Furnishing Information and Medical Treatment to Minors for Prevention, Termination and Treatment of Pregnancy, Clearinghouse Review 131, 132 (July 1971); Reiss, Contraceptive Information and Sexual Morality, Journal of Sex Research 51 (Apr. 1966). See also Note, Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy, 88 Harv. L. Rev. 1001, 1010, and n. 67 (1975); Jordan, A Minor's Right to Contraceptives, 7 U. Calif. Davis L. Rev. 270, 272–273 (1974).

[20] See, *e. g.*, *id.*, at 271–273; Kanter & Zelnick, Sexual Experience of Young Unmarried Women in the United States, Family Planning Perspectives 9 (Oct. 1972).

[21] Although this is not the occasion for a full examination of these problems, the following data sketchily indicate their extent. According to New York City Department of Health statistics, filed with the Court by the American Civil Liberties Union as *amicus curiae*, in New York City alone there were over 6,000 live births to girls under the age of 17 in 1975, as well as nearly 11,000 abortions. Moreover, "[t]eenage motherhood involves a host of problems, including adverse physical and psychological effects upon the minor and her baby, the continuous stigma associated with unwed motherhood, the need to drop out of school with the accompanying impairment of educational opportunities, and other dislocations [including] forced marriage of immature couples and the often acute anxieties involved in deciding whether to secure an abortion." Note, Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy, 88 Harv. L. Rev. 1001, 1010 (1975) (footnotes omitted). See also Jordan, *supra*, n. 19, at 273–275.

[22] Appellants argue that the statement in *Ginsberg* v. *New York*, 390

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Appellants argue that New York does not totally prohibit distribution of contraceptives to minors under 16, and that accordingly § 6811 (8) cannot be held unconstitutional. Although § 6811 (8) on its face is a flat unqualified prohibition, Educ. Law § 6807 (b) (McKinney, Supp. 1976–1977), see nn. 1, 7, and 13, *supra*, provides that nothing in Education Law §§ 6800–6826 shall be construed to prevent "[a]ny physician . . . from supplying his patients with such drugs as [he] . . . deems proper in connection with his practice." This narrow exception, however, does not save the statute. As we have held above as to limitations upon distribution to adults, less than total restrictions on access to contraceptives that significantly burden the right to decide whether to bear children must also pass constitutional scrutiny. Appellants assert no medical necessity for imposing a medical limitation on the distribution of nonprescription contraceptives to minors. Rather, they argue that such a restriction serves to emphasize to young people the seriousness with which the State views the decision to engage in sexual intercourse at an early age.[23] But this is only another form of the

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U. S., at 641, that "it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors," is authority that the burden is appellees' to prove that there is no connection between the statute and the asserted state policy. But *Ginsberg* concerned a statute prohibiting dissemination of obscene material that it held was not constitutionally protected. In contrast § 6811 (8) concerns distribution of material access to which is essential to exercise of a fundamental right.

[23] There is considerable doubt that appellants accurately identify the legislative purposes in enacting Educ. Law §§ 6807 (b) and 6811 (8). Section 6811 (8) (formerly Educ. Law § 6804–b and before that Penal Law § 1142 (2)) was first enacted in 1965 as a modification, apparently in response to *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), of former Penal Law § 1142, titled "Indecent articles." 1965 N. Y. Laws, c. 637. This statute, which dated back at least to § 318 of the Penal Code of

argument that juvenile sexual conduct will be deterred by making contraceptives more difficult to obtain. Moreover, that argument is particularly poorly suited to the restriction

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1881, 1881 N. Y. Laws, c. 676, had made it a misdemeanor for any person to distribute or advertise "any instrument or article, or any drug or medicine, for the prevention of conception." Section 6807 (b), on the other hand, generally excepts the distribution of drugs by a physician in the course of his practice from all the licensing requirements and restrictions imposed on the practice of pharmacy by Education Law §§ 6800–6826 (subject to certain provisos not here relevant). Such a provision, in one form or another and bearing several different numbers, has been included in the article concerning the practice of pharmacy since that article was first incorporated in the Education Law in 1927, see former Education Law § 1361, 1927 N. Y. Laws, c. 85, and before that a similar provision was included in the statutes regulating pharmacy in the Public Health Law. See, *e. g.*, Public Health Law of 1893, § 187, 1893 N. Y. Laws, c. 661. Thus, § 6807 (b) and its predecessors long predate the inclusion of § 6811 (8) in the Education Law.

Even more significantly, when § 6811 (8) was first enacted as Penal Law § 1142 (2), it was not subject to the physicians' exception of § 6807 (b). Rather, it was apparently subject to a different physicians' exception, former Penal Law § 1145 (§ 321 of the Penal Code of 1881), which provided:

"An article or instrument, used or applied by physicians lawfully practicing, or by their direction or prescription, for the cure or prevention of disease, is not an article of indecent or immoral nature or use, within this chapter. The supplying of such articles to such physicians or by their direction or prescription, is not an offense under this chapter."

This was interpreted by the New York Court of Appeals to permit a physician "in good faith" to use contraceptives to treat "a married person to cure or prevent disease," but not to permit "promiscuous advice to patients irrespective of their condition." *People* v. *Sanger*, 222 N. Y. 192, 194–195, 118 N. E. 637, 637–638 (1918), appeal dismissed for lack of jurisdiction, 251 U. S. 537 (1919) (*per curiam*). See also *People* v. *Byrne*, 99 Misc. 1, 163 N. Y. S. 682 (1917); *People* v. *Baird*, 47 Misc. 2d 478, 262 N. Y. S. 2d 947 (1965).

In light of this history, it appears that insofar as the legislature had § 6807 (b) in mind at all when it transferred the prohibition of distribu-

appellants are attempting to justify, which on appellants' construction delegates the State's authority to disapprove of minors' sexual behavior to physicians, who may exercise it arbitrarily,[24] either to deny contraceptives to young people, or to undermine the State's policy of discouraging illicit early sexual behavior. This the State may not do. Cf. *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S., at 69, 74.[25]

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tion of contraceptives to those under 16 from the Penal Law to the Education Law, it thought of that section as at most a narrow exception, analogous to § 1145, permitting physicians, "in connection with [their] practice," to treat or prevent disease, rather than, as appellants assert, intending that §§ 6807 (b) and 6811 (8) be read together as establishing a scheme under which contraceptives would be freely available to those under 16, but limiting the distribution function to physicians. The legislative history of attempts in 1972 and 1974 to modify § 6811 (8), to which appellants refer, supports this construction. The legislators debating those bills seem to have thought of § 6811 (8) as a flat prohibition of the distribution of contraceptives to minors, and made no reference to § 6807 (b).

[24] In *Doe* v. *Bolton*, 410 U. S. 179, 196 (1973), we doubted that physicians would allow their moral "predilections on extramarital sex" to interfere with their medical judgments concerning abortions. Here, however, no *medical* judgment is involved at all; the State purports to commission physicians to engage in *moral* counseling that can reflect little other than their private views on the morality of premarital sex among the young. It seems evident that many physicians are likely to have views on this subject to a significant degree more permissive or more restrictive than those of the State, the minor, or the minor's parents. Moreover, nothing in § 6807 (b) suggests that the role of the physician is limited to such "counseling." The statute does nothing more than to permit the physician to provide his patients with such drugs or devices as he "deems proper." Such "absolute, and possibly arbitrary" discretion over the privacy rights of minors is precisely what *Planned Parenthood* condemned. 428 U. S., at 74.

[25] In cases involving abortions, we have emphasized that the decision to terminate a pregnancy is properly made by a woman in consultation with her physician. See, *e. g.*, *Roe* v. *Wade*, 410 U. S. 113, 153, 164 (1973); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S.,

V

The District Court's holding that the prohibition of any "advertisement or display" of contraceptives is unconstitutional was clearly correct. Only last Term *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council*, 425 U. S. 748 (1976), held that a State may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity," even when that information could be categorized as "commercial speech." *Id.*, at 773. Just as in that case, the statute challenged here seeks to suppress completely any information about the availability and price of contraceptives.[26] Nor does the case present any question left open in *Virginia Pharmacy Bd.*; here, as there, there can be no contention that the regulation is "a mere time, place, and manner restriction," *id.*, at 771, or that it prohibits only misleading or deceptive advertisements, *ibid.*, or "that the transactions proposed in the forbidden advertisements are themselves illegal in any way. Cf. *Pittsburgh Press Co.* v. *Human Relations Comm'n*, [413 U. S. 376 (1973)]." *Id.*, at 772–773. Moreover, in addition to the "substantial individual and societal interests" in the free flow of commercial information enumerated in *Virginia Pharmacy Bd., supra*, at 763–766, the

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at 75. No such suggestion, however, has been made concerning the right to obtain or use contraceptives. See *Griswold* v. *Connecticut, supra; Eisenstadt* v. *Baird*, 405 U. S. 438 (1972). The reason, of course, is that the abortion decision necessarily involves a medical judgment, *Roe* v. *Wade, supra*, at 164, while the decision to use a nonhazardous contraceptive does not. *Eisenstadt* v. *Baird, supra*, at 463–464 (WHITE, J., concurring in result). See also n. 24, *supra*.

[26] The prohibition of advertising and display of contraceptives is invalid as to prescription as well as nonprescription contraceptives, at least when the advertising is by persons who are licensed to sell such products. *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council*, 425 U. S. 748 (1976).

information suppressed by this statute "related to activity with which, at least in some respects, the State could not interfere." 425 U. S., at 760. Cf. *Bigelow* v. *Virginia*, 421 U. S. 809 (1975).

Appellants contend that advertisements of contraceptive products would be offensive and embarrassing to those exposed to them, and that permitting them would legitimize sexual activity of young people. But these are classically not justifications validating the suppression of expression protected by the First Amendment. At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression. See, *e. g.*, *Cohen* v. *California*, 403 U. S. 15 (1971).[27] As for the possible "legitimation" of illicit sexual behavior, whatever might be the case if the advertisements directly incited illicit sexual activity among the young, none of the advertisements in this record can even remotely be characterized as "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969). They merely state the availability of products and services that are not only entirely legal, cf. *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376 (1973), but constitutionally protected. Cf. *Bigelow* v. *Virginia*, *supra*.[28] These arguments

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[27] Indeed, as the Court recognized in *Virginia Pharmacy Bd.*, much advertising is "tasteless and excessive," and no doubt offends many. 425 U. S., at 765.

[28] Appellants suggest no distinction between commercial and noncommercial speech that would render these discredited arguments meritorious when offered to justify prohibitions on commercial speech. On the contrary, such arguments are clearly directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed and form of expression—the core of First Amendment values. Cf. *Linmark Associates, Inc.* v. *Willingboro*, *ante*, at 96–97.

therefore do not justify the total suppression of advertising concerning contraceptives.[29]

Affirmed.

THE CHIEF JUSTICE dissents.

MR. JUSTICE WHITE, concurring in part and concurring in the result.

I join Parts I, III, and V of the Court's opinion and concur in the result with respect to Part IV.*

Although I saw no reason in *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972), to reach "the novel constitutional question whether a State may restrict or forbid the distribution of contraceptives to the unmarried," *id.*, at 465 (concurring in result), four of the seven Justices participating in that case held that in this respect the rights of unmarried persons were equal to those of the married. Given *Eisenstadt* and given the decision of the Court in the abortion case, *Roe* v. *Wade*, 410 U. S. 113 (1973), the result reached by the Court in Part III of its opinion appears warranted. I do not regard the opinion, however, as declaring unconstitutional any state law forbidding extramarital sexual relations. On this assumption I join Part III.

I concur in the result in Part IV primarily because the State has not demonstrated that the prohibition against distribution of contraceptives to minors measurably contributes to the deterrent purposes which the State advances as justification for the restriction. Again, however, the legality of state laws forbidding premarital intercourse is not at issue here; and, with MR. JUSTICE STEVENS, "I would describe as

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[29] We do not have before us, and therefore express no views on, state regulation of the time, place, or manner of such commercial advertising based on these or other state interests.

*There is no need for present purposes to agree or disagree with the Court's summary of the law expressed in Part II.

'frivolous' appellees' argument that a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the State," *post*, at 713.

In joining Part V of the Court's opinion, I should also say that I agree with the views of MR. JUSTICE STEVENS expressed in Part II of his separate opinion.

MR. JUSTICE POWELL, concurring in part and concurring in the judgment.

I agree that Population Planning Associates has standing to maintain this action, and therefore join Part I of the Court's opinion. Although I concur in the judgment of the Court, I am not persuaded that the Constitution requires the severe constraints that the Court's opinion places upon legislative efforts to regulate the distribution of contraceptives, particularly to the young.

I

The Court apparently would subject all state regulation affecting adult sexual relations to the strictest standard of judicial review. Under today's decision, such regulation "may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Ante*, at 686. Even regulation restricting only the sexual activity of the young must now be justified by a "significant state interest," a standard that is "apparently less rigorous" than the standard the Court would otherwise apply. *Ante*, at 693 n. 15. In my view, the extraordinary protection the Court would give to all personal decisions in matters of sex is neither required by the Constitution nor supported by our prior decisions.

A

The cases on which the Court relies for its "compelling interest" standard do not support the sweeping principle it adopts today. Those cases generally involved direct and sub-

stantial interference with constitutionally protected rights. In *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), the Court invalidated a state statute prohibiting the use of contraceptives and making it illegal for physicians to give advice to married persons regarding contraception. The statute was viewed as one "operat[ing] directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation," *id.*, at 482, and "seek[ing] to achieve its goals by means having a maximum destructive impact upon that relationship," *id.*, at 485. In *Roe* v. *Wade*, 410 U. S. 113 (1973), the Court reviewed a Texas statute imposing severe criminal sanctions on physicians and other medical personnel who performed nontherapeutic abortions, thus effectively foreclosing the availability and safety of this desired service. And just last Term, in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976), we invalidated Missouri's requirement of spousal consent as a state-imposed "absolute obstacle to a woman's decision that *Roe* held to be constitutionally protected from such interference." *Id.*, at 71 n. 11.

The Court relies on *Planned Parenthood*, *supra*, and *Doe* v. *Bolton*, 410 U. S. 179 (1973), for the proposition that "the same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely." *Ante*, at 688. But neither of those cases refers to the "compelling state interest" test. In *Bolton*, the Court invalidated procedural requirements of the Georgia abortion statute that were found not "reasonably related" to the asserted legislative purposes or to the "patient's needs." 410 U. S., at 194, 199. *Planned Parenthood* involved—in addition to the "absolute obstacle" referred to above—the Missouri requirement of prior written consent by the pregnant woman. Despite the fact that Missouri normally did not require written consent for other surgical procedures, the Court

sustained this regulation without requiring any demonstration of compelling state interests. The Court recognized that the decision to abort "is an important, and often a stressful one," and the State thus constitutionally could assure that the woman was aware of the significance of the decision. 428 U. S., at 67.

In sum, the Court quite unnecessarily extends the reach of cases like *Griswold* and *Roe*. Neither our precedents nor sound principles of constitutional analysis require state legislation to meet the exacting "compelling state interest" standard whenever it implicates sexual freedom. In my view, those cases make clear that that standard has been invoked only when the state regulation entirely frustrates or heavily burdens the exercise of constitutional rights in this area. See *Bellotti* v. *Baird*, 428 U. S. 132, 147 (1976). This is not to say that other state regulation is free from judicial review. But a test so severe that legislation rarely can meet it should be imposed by courts with deliberate restraint in view of the respect that properly should be accorded legislative judgments.

B

There is also no justification for subjecting restrictions on the sexual activity of the young to heightened judicial review. Under our prior cases, the States have broad latitude to legislate with respect to adolescents. The principle is well settled that "a State may permissibly determine that, at least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice" which is essential to the exercise of various constitutionally protected interests. *Ginsberg* v. *New York*, 390 U. S. 629, 649–650 (1968) (STEWART, J., concurring in result). This principle is the premise of our prior decisions, ostensibly reaffirmed by the plurality, *ante*, at 692, holding that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." *Prince* v. *Massachusetts*, 321 U. S. 158, 170 (1944).

Restraints on the freedom of minors may be justified "even though comparable restraints on adults would be constitutionally impermissible." *Planned Parenthood of Central Missouri* v. *Danforth, supra,* at 102 (STEVENS, J., concurring in part and dissenting in part).[1]

New York has exercised its responsibility over minors in areas falling within the "cluster of constitutionally protected choices" relating to sex and marriage. *Ante,* at 685. It has set an age limitation below which persons cannot marry without parental consent, N. Y. Dom. Rel. Law §§ 15, 15–a (McKinney 1964 and Supp. 1976–1977), and has established by statute the age at which a minor is legally recognized as having the capacity to consent to sexual activity, Penal Law § 130.05 (3) (a) (McKinney 1975). See also Penal Law §§ 130.25, 130.30, 130.35 (McKinney 1975). These provisions highlight the State's concern that its juvenile citizens generally lack the maturity and understanding necessary to make decisions concerning marriage and sexual relationships.

Until today, I would not have thought it was even arguably necessary to review state regulation of this sort under a standard that for all practical purposes approaches the "compelling state interest" standard. At issue in *Ginsberg* v. *New York, supra,* for example, was the question of the constitutionality on its face of a New York criminal obscenity statute which prohibited the sale to minors of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults. The Court recognized that "the State has

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[1] MR. JUSTICE STEVENS recently provided the following examples, deeply rooted in our traditions and law:

"Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant." 428 U. S., at 102.

an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'" 390 U. S., at 640–641, quoting *Prince* v. *Massachusetts, supra,* at 165. Consequently, the "only question remaining" in that case was "whether the New York Legislature might rationally conclude, as it has, that exposure to the materials proscribed by [the statute] constitutes such an 'abuse.'" 390 U. S., at 641. Similarly, the relevant question in any case where state laws impinge on the freedom of action of young people in sexual matters is whether the restriction rationally serves valid state interests.

II

With these considerations in mind, I turn to the specific provisions of the New York statute limiting the distribution of contraceptives.

A

New York has made it a crime for anyone other than a physician to sell or distribute contraceptives to minors under the age of 16 years. Educ. Law § 6811 (8) (McKinney 1972). This element of New York's program of regulation for the protection of its minor citizens is said to evidence the State's judgment that the health and well-being of minors would be better assured if they are not encouraged to engage in sexual intercourse without guidance. Although I have no doubt that properly framed legislation serving this purpose would meet constitutional standards, the New York provision is defective in two respects. First, it infringes the privacy interests of married females between the ages of 14 and 16, see *ante,* at 695 n. 18, in that it prohibits the distribution of contraceptives to such females except by a physician. In authorizing marriage at that age, the State also sanctions sexual intercourse between the partners and expressly recognizes that once the marriage relationship exists the husband and

wife are presumed to possess the requisite understanding and maturity to make decisions concerning sex and procreation. Consequently, the state interest that justifies a requirement of prior counseling with respect to minors in general simply is inapplicable with respect to minors for whom the State has affirmatively approved marriage.

Second, this provision prohibits parents from distributing contraceptives to their children, a restriction that unjustifiably interferes with parental interests in rearing their children. Cf. *Ginsberg* v. *New York*, 390 U. S., at 639 and n. 7. "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'" *Ibid.*, quoting *Prince* v. *Massachusetts*, *supra*, at 166. See *Wisconsin* v. *Yoder*, 406 U. S. 205, 231–233 (1972); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390, 399–401 (1923). Moreover, this statute would allow the State "to enquire into, prove, and punish," *Poe* v. *Ullman*, 367 U. S. 497, 548 (1961) (Harlan, J., dissenting), the exercise of this parental responsibility. The State points to no interest of sufficient magnitude to justify this direct interference with the parental guidance that is especially appropriate in this sensitive area of child development.[2]

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[2] The particular provision at issue makes it a crime for "[a]ny person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of contraception to a minor under the age of sixteen years . . . ." Educ. Law § 6811 (8) (McKinney 1972). For the reasons stated in the text, this provision unjustifiably infringes the constitutionally protected interests of parents and married female minors, and it is invalid in those two respects. Although the prohibition on distribution might be sustained as to other individuals if the restrictions on

But in my view there is considerably more room for state regulation in this area than would be permissible under the plurality's opinion. It seems clear to me, for example, that the State would further a constitutionally permissible end if it encouraged adolescents to seek the advice and guidance of their parents before deciding whether to engage in sexual intercourse. *Planned Parenthood*, 428 U. S., at 91 (STEWART, J., concurring). The State justifiably may take note of the psychological pressures that might influence children at a time in their lives when they generally do not possess the maturity necessary to understand and control their responses. Participation in sexual intercourse at an early age may have both physical and psychological consequences. These include the risks of venereal disease and pregnancy, and the less obvious mental and emotional problems that may result from sexual activity by children. Moreover, society has long adhered to the view that sexual intercourse should not be engaged in promiscuously, a judgment that an adolescent may be less likely to heed than an adult.

Requiring minors to seek parental guidance would be consistent with our prior cases. In *Planned Parenthood*, we considered whether there was "any significant state interest in conditioning [a minor's] abortion [decision] on the consent of a parent or person *in loco parentis* that is not present in the case of an adult." 428 U. S., at 75. Observing that the minor necessarily would be consulting with a physician on all aspects of the abortion decision, we concluded that the Missouri requirement was invalid because it im-

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parental distribution and distribution to married female minors could be treated as severable, the result "would be to create a program quite different from the one the legislature actually adopted." *Sloan* v. *Lemon*, 413 U. S. 825, 834 (1973). I therefore agree with the Court that the entire provision must be invalidated. See *Dorchy* v. *Kansas*, 264 U. S. 286, 291 (1924); *Dollar Co.* v. *Canadian C. & F. Co.*, 220 N. Y. 270, 279, 115 N. E. 711, 713 (1917).

posed "a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and [did] so without a sufficient justification for the restriction." *Ibid.* But we explicitly suggested that a materially different constitutional issue would be presented with respect to a statute assuring in most instances consultation between the parent and child. *Ibid.*, citing *Bellotti* v. *Baird*, 428 U. S. 132 (1976). See *Planned Parenthood*, *supra*, at 90–91 (STEWART, J., concurring).

A requirement of prior parental consultation is merely one illustration of permissible regulation in this area. As long as parental distribution is permitted, a State should have substantial latitude in regulating the distribution of contraceptives to minors.[3]

B

New York also makes it a crime for anyone other than a licensed pharmacist to sell or distribute contraceptives to adults and to minors aged 16 or over. The only serious justification offered by the State for this prohibition is that it is necessary to facilitate enforcement of the limitation on distribution to children under 16 years of age. Since the Court invalidates that limitation today, the pharmacy restriction lacks any rational justification. I therefore agree with the Court that § 6811 (8)'s limitation on the distribution of nonprescription contraceptives cannot be sustained.

But even if New York were to enact constitutionally permissible limitations on access for children, I doubt that it could justify the present pharmacy restriction as an enforcement measure. Restricting the kinds of retail outlets that may dis-

[3] As long as access is available through parents, I perceive no constitutional obstacle to state regulation that authorizes other designated adults—such as physicians—to provide relevant counseling.

tribute contraceptives may well be justified,[4] but the present statute even prohibits distribution by mail to adults. In this respect, the statute works a significant invasion of the constitutionally protected privacy in decisions concerning sexual relations. By requiring individuals to buy contraceptives over the counter, the statute heavily burdens constitutionally protected freedom.[5]

III

I also agree with the Court that New York cannot lawfully prohibit all "advertisement or display" of contraceptives. But it seems to me that the Court's opinion may be read too broadly. It flatly dismisses, as justifications "classically" irrelevant, the State's contentions that the indiscriminate advertisement of contraceptive products in some settings could be unduly offensive and could be viewed by the young as legitimation of sexual promiscuity. I agree that these jus-

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[4] Absent some evidence that a restriction of outlets to registered pharmacists heavily burdens the constitutional interests of adults, there would be no basis for applying the standard of review articulated in *Griswold* and *Roe*. See Part I, *supra*. Indeed, in the absence of such evidence there would be no reason to set aside a legislative judgment that enforcement of constitutionally permissible limitations on access for minors, see Part II–A, *supra*, warrants a reasonable limitation on the means for marketing contraceptives. Without some limitations on the number and type of retail outlets it would be difficult—if not impossible—to effectuate the state interest in assuring that minors are counseled before purchasing contraceptive devices. As pharmacists are licensed professionals, the State may be justified in relying on them to act responsibly in observing regulations applicable to minors.

[5] It is not a satisfactory answer that an individual may preserve anonymity as one of a number of customers in a retail outlet. However impersonal the marketplace may be, it does not approach the privacy of the home. There may be some risk that mail distribution will occasionally permit circumvention of permissible restrictions with respect to children, but this does not justify the concomitant burden on the constitutional rights of adults.

tifications cannot support a complete ban on advertising, but I see no reason to cast any doubt on the authority of the State to impose carefully tailored restrictions designed to serve legitimate governmental concerns as to the effect of commercial advertising on the young.[6]

MR. JUSTICE STEVENS, concurring in part and concurring in the judgment.

For the reasons stated in Parts I, II, and III of the opinion of the Court, which I join, I agree that Population Planning Associates, Inc., has standing to challenge the New York statute and that the grant to licensed pharmacists of a monopoly in the distribution of nonmedical contraceptives is unconstitutional. I also agree with the conclusion that New York's prohibition against the distribution of contraceptives to persons under 16 years of age is unconstitutional, and with the Court's conclusion that the total suppression of advertising or display of contraceptives is invalid, but my reasons differ from those set forth in Part IV of MR. JUSTICE BREN-

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[6] The State argues that unregulated commercial advertisement of contraceptive products would be viewed by the young as "legitimation" of—if not an open invitation to—sexual promiscuity. The Court simply finds on the basis of the advertisements in the record before us that this interest does not justify total suppression of advertising concerning contraceptives. The Court does leave open the question whether this or other state interests would justify regulation of the time, place, or manner of such commercial advertising. *Ante*, at 702 n. 29. In my view, such carefully tailored restrictions may be especially appropriate when advertising is accomplished by means of the electronic media. As Judge Leventhal recently observed in that context: "[T]here is a distinction between the all-out prohibition of a censor, and regulation of time and place of speaking out, which still leaves access to a substantial part of the mature audience. What is entitled to First Amendment protection is not necessarily entitled to First Amendment protection in all places. *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 . . . (1976). Nor is it necessarily entitled to such protection at all times." *Pacifica Foundation* v. *FCC*, 181 U. S. App. D. C. 132, 157, 556 F. 2d 9, 34 (1977) (dissenting opinion).

NAN's opinion and I wish to add emphasis to the limitation on the Court's holding in Part V.

I

There are two reasons why I do not join Part IV. First, the holding in *Planned Parenthood of Missouri* v. *Danforth*, 428 U. S. 52, 72–75, that a minor's decision to abort her pregnancy may not be conditioned on parental consent, is not dispositive here. The options available to the already pregnant minor are fundamentally different from those available to nonpregnant minors. The former must bear a child unless she aborts; but persons in the latter category can and generally will avoid childbearing by abstention. Consequently, even if I had joined that part of *Planned Parenthood*, I could not agree that the Constitution provides the same measure of protection to the minor's right to use contraceptives as to the pregnant female's right to abort.

Second, I would not leave open the question whether there is a significant state interest in discouraging sexual activity among unmarried persons under 16 years of age. Indeed, I would describe as "frivolous" appellees' argument that a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the State.

For the reasons explained by MR. JUSTICE POWELL, I agree that the statute may not be applied to married females between the ages of 14 and 16, or to distribution by parents. I am not persuaded, however, that these glaring defects alone justify an injunction against other applications of the statute. Only one of the three plaintiffs in this case is a parent who wishes to give contraceptives to his children. The others are an Episcopal minister who sponsors a program against venereal disease, and a mail-order firm, which presumably has no way to determine the age of its customers. I am satisfied, for the reasons that follow, that the statute is also invalid as applied to them.

The State's important interest in the welfare of its young citizens justifies a number of protective measures. See *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, at 102 (STEVENS, J., concurring in part and dissenting in part). Such special legislation is premised on the fact that young persons frequently make unwise choices with harmful consequences; the State may properly ameliorate those consequences by providing, for example, that a minor may not be required to honor his bargain. It is almost unprecedented, however, for a State to require that an ill-advised act by a minor give rise to greater risk of irreparable harm than a similar act by an adult.[1]

Common sense indicates that many young people will engage in sexual activity regardless of what the New York Legislature does; and further, that the incidence of venereal disease and premarital pregnancy is affected by the availability or unavailability of contraceptives. Although young persons theoretically may avoid those harms by practicing total abstention, inevitably many will not. The statutory prohibition denies them and their parents a choice which, if available, would reduce their exposure to disease or unwanted pregnancy.

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[1] Only two other States have adopted similar legislation. Family Planning, Contraception and Voluntary Sterilization: An Analysis of Laws and Policies in the United States, Each State and Jurisdiction, A Report of the National Center for Family Planning Services 76 (1971) (DHEW Pub. No. (HSA) 74-16001). This publication contains a comprehensive survey of state laws in this area. The authors were aware of "no case in which either a doctor or a layman has been successfully prosecuted under any criminal statute for providing contraceptive information or services to a minor or has been held liable for damages for providing contraception to a minor without parental consent." *Id.*, at 70. This survey also indicated that "the clear trend is toward the removal of all such barriers to the sale and distribution of contraceptives." *Id.*, at 59. By 1971 there were 34 States with no law restricting or regulating distribution of contraceptives, *ibid.*, and 33 States with no restrictions on advertising or display. *Id.*, at 60.

The State's asserted justification is a desire to inhibit sexual conduct by minors under 16. Appellants do not seriously contend that if contraceptives are available, significant numbers of minors who now abstain from sex will cease abstaining because they will no longer fear pregnancy or disease.[2] Rather appellants' central argument is that the statute has the important *symbolic* effect of communicating disapproval of sexual activity by minors.[3] In essence, therefore, the statute is defended as a form of propaganda, rather than a regulation of behavior.[4]

Although the State may properly perform a teaching function, it seems to me that an attempt to persuade by inflicting harm on the listener is an unacceptable means of conveying a message that is otherwise legitimate. The propaganda technique used in this case significantly increases the risk of unwanted pregnancy and venereal disease. It is as though a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets. One need not posit a constitutional right to ride a motorcycle to characterize such a restriction as irrational and perverse.

Even as a regulation of behavior, such a statute would be defective. Assuming that the State could impose a uniform

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[2] Appellants make this argument only once, in passing. See Brief for Appellants 20. In the District Court, appellants candidly admitted that "there is no evidence that teenage extramarital sexual activity increases in proportion to the availability of contraceptives. . . ." See 398 F. Supp. 321, 332. Indeed, appellants maintain that it is a "fact that youngsters will not use contraceptives even where available . . . ." Reply Brief for Appellants 5.

[3] The fact that the State admittedly has never brought a prosecution under the statute, *id.*, at 2, is consistent with appellants' position that the purpose of the statute is merely symbolic.

[4] Appellants present no empirical evidence to support the conclusion that the State's "propaganda" is effective. Simply as a matter of common sense, it seems unlikely that many minors under 16 are influenced by the mere existence of a law indirectly disapproving of their conduct.

sanction upon young persons who risk self-inflicted harm by operating motorcycles, or by engaging in sexual activity, surely that sanction could not take the form of deliberately injuring the cyclist or infecting the promiscuous child. If such punishment may not be administered deliberately, after trial and a finding of guilt, it manifestly cannot be imposed by a legislature, indiscriminately and at random. This kind of government-mandated harm, is, in my judgment, appropriately characterized as a deprivation of liberty without due process of law.

II

In Part V of its opinion, the Court holds that New York's total ban on contraceptive advertising is unconstitutional under *Bigelow* v. *Virginia*, 421 U. S. 809, and *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council*, 425 U. S. 748. Specifically, the Court holds that all contraceptive advertising may not be suppressed because *some* advertising of that subject may be offensive and embarrassing to the reader or listener. I also agree with that holding.

The Court properly does not decide whether the State may impose any regulation on the content of contraceptive advertising in order to minimize its offensive character. I have joined Part V of the opinion on the understanding that it does not foreclose such regulation simply because an advertisement is within the zone protected by the First Amendment.

The fact that a type of communication is entitled to some constitutional protection does not require the conclusion that it is totally immune from regulation. Cf. *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 65–71 (opinion of STEVENS, J.). An editorial and an advertisement in the same newspaper may contain misleading matter in equal measure. Although each is a form of protected expression, one may be censored while the other may not.

In the area of commercial speech—as in the business of exhibiting motion pictures for profit—the offensive character of

the communication is a factor which may affect the time, place, or manner in which it may be expressed. Cf. *Young* v. *American Mini Theatres, Inc., supra.* The fact that the advertising of a particular subject matter is *sometimes* offensive does not deprive all such advertising of First Amendment protection; but it is equally clear to me that the existence of such protection does not deprive the State of all power to regulate such advertising in order to minimize its offensiveness. A picture which may appropriately be included in an instruction book may be excluded from a billboard.

I concur in the judgment and in Parts I, II, III, and V of the Court's opinion.

MR. JUSTICE REHNQUIST, dissenting.

Those who valiantly but vainly defended the heights of Bunker Hill in 1775 made it possible that men such as James Madison might later sit in the first Congress and draft the Bill of Rights to the Constitution. The post-Civil War Congresses which drafted the Civil War Amendments to the Constitution could not have accomplished their task without the blood of brave men on both sides which was shed at Shiloh, Gettysburg, and Cold Harbor. If those responsible for these Amendments, by feats of valor or efforts of draftsmanship, could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's room of truck stops, notwithstanding the considered judgment of the New York Legislature to the contrary, it is not difficult to imagine their reaction.[1]

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[1] As well as striking down the New York prohibitions of commercial advertising and sales to persons under 16, the Court holds invalid the State's requirement that all sales be made by licensed pharmacists. Whatever New York's reasons for this particular restriction on distribution—and several can be imagined—I cannot believe that it could significantly impair

I do not believe that the cases discussed in the Court's opinion require any such result, but to debate the Court's treatment of the question on a case-by-case basis would concede more validity to the result reached by the Court than I am willing to do.[2] There comes a point when endless and ill-considered extension of principles originally formulated in quite different cases produces such an indefensible result that no logic chopping can possibly make the fallacy of the result more obvious. The Court here in effect holds that the First and Fourteenth Amendments not only guarantee full and free debate *before* a legislative judgment as to the moral dangers to which minors within the jurisdiction of the State should not be subjected, but goes further and absolutely prevents the representatives of the majority from carrying out such a policy *after* the issues have been fully aired.

No questions of religious belief, compelled allegiance to a secular creed, or decisions on the part of married couples as to procreation, are involved here. New York has simply decided that it wishes to discourage unmarried minors under 16 from having promiscuous sexual intercourse with one another. Even the Court would scarcely go so far as to say that this is not a subject with which the New York Legislature may properly concern itself.

That legislature has not chosen to deny to a pregnant woman, after the *fait accompli* of pregnancy, the one remedy

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the access to these products of a person with a settled and deliberate intention to procure them.

[2] I cannot, however, let pass without comment, the statement that "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." *Ante*, at 688 n. 5, 694 n. 17. While we have not ruled on every conceivable regulation affecting such conduct the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been "definitively" established. *Doe* v. *Commonwealth's Attorney*, 425 U. S. 901 (1976). See *Hicks* v. *Miranda*, 422 U. S. 332, 343–344 (1975).

which would enable her to terminate an unwanted pregnancy. It has instead sought to deter the conduct which will produce such *faits accomplis*. The majority of New York's citizens are in effect told that however deeply they may be concerned about the problem of promiscuous sex and intercourse among unmarried teenagers, they may not adopt this means of dealing with it. The Court holds that New York may not use its police power to legislate in the interests of its concept of the public morality as it pertains to minors. The Court's denial of a power so fundamental to self-government must, in the long run, prove to be but a temporary departure from a wise and heretofore settled course of adjudication to the contrary. I would reverse the judgment of the District Court.

ILLINOIS BRICK CO. ET AL. *v.* ILLINOIS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 76–404. Argued March 23, 1977—Decided June 9, 1977

Respondents, the State of Illinois and 700 local governmental entities, brought this antitrust treble-damages action under § 4 of the Clayton Act alleging that petitioners, concrete block manufacturers (which sell to masonry contractors, which in turn sell to general contractors, from which respondents purchase the block in the form of masonry structures) had engaged in a price-fixing conspiracy in violation of § 1 of the Sherman Act. Petitioners, relying on *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, moved for partial summary judgment against all plaintiffs that were indirect purchasers of block from petitioners, contending that only direct purchasers could sue for the alleged overcharge. The District Court granted the motion, but the Court of Appeals reversed, holding that indirect purchasers such as respondents could recover treble damages for an illegal overcharge if they could prove that the overcharge was passed on to them through the intermediate distribution channels. *Hanover Shoe* held that generally the illegally overcharged direct purchaser suing for treble damages, and not others in the chain of manufacture or distribution, is the party "injured in his business or property" within the meaning of § 4. *Held:*

1. If a pass-on theory may not be used defensively by an antitrust violator (defendant) against a direct purchaser (plaintiff) that theory may not be used offensively by an indirect purchaser (plaintiff) against an alleged violator (defendant). Therefore, unless *Hanover Shoe* is to be overruled or limited, it bars respondents' pass-on theory. Pp. 729–736.

(a) Allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants, since even though an indirect purchaser had already recovered for all or part of an overcharge passed on to him, the direct purchaser would still automatically recover the full amount of the overcharge that the indirect purchaser had shown to be passed on, and, similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount. Overlapping recoveries would certainly result from the two lawsuits unless the indirect purchaser is unable to establish any pass-on whatsoever. Pp. 730–731.

(b) The Court's perception in *Hanover Shoe* of the uncertainties and difficulties in analyzing price and output decisions "in the real economic world rather than an economist's hypothetical model," applies with equal force to the assertion of pass-on theories by plaintiffs as it does to such assertion by defendants. Pp. 731–733.

(c) Because *Hanover Shoe* would bar petitioners from using respondents' pass-on theory as a defense to a treble-damages suit by the direct purchasers (the masonry contractors), *Hanover Shoe* must be overruled (or narrowly limited), or it must be applied to bar respondents' attempt to use this pass-on theory offensively. Pp. 735–736.

2. *Hanover Shoe* was correctly decided and its construction of § 4 is adhered to. Pp. 736–747.

(a) Considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation. Pp. 736–737.

(b) Whole new dimensions of complexity would be added to treble-damages suits, undermining their effectiveness, if the use of pass-on theories under § 4 were allowed. Even under the optimistic assumption that joinder of potential plaintiffs would deal satisfactorily with problems of multiple litigation and liability, § 4 actions would be transformed into massive multiparty litigations involving many distribution levels and including large classes of ultimate consumers remote from the defendant. The Court's concern in *Hanover Shoe* with the problems of "massive evidence and complicated theories" involved in attempting to establish a pass-cn defense against a direct purchaser applies *a fortiori* to the attempt to trace the effect of the overcharge through each step in the distribution chain from the direct purchasers to the ultimate consumer. Pp. 737–744.

(c) Attempts to carve out exceptions to *Hanover Shoe* for particular types of markets would entail the very problems that *Hanover Shoe* sought to avoid. Pp. 744–745.

(d) The legislative purpose in creating a group of "private attorneys general" to enforce the antitrust laws under § 4, *Hawaii* v. *Standard Oil Co. of California*, 405 U. S. 251, 262, is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it. Pp. 745–747.

536 F. 2d 1163, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ.,

joined, *post*, p. 748. BLACKMUN, J., filed a dissenting opinion, *post*, p. 765.

Edward H. Hatton argued the cause for petitioners. With him on the briefs were *Lynne E. McNown*, *Alan L. Metz*, *Samuel J. Betar*, *Earl E. Pollack*, *James P. Morgan*, *Thomas W. Johnston*, and *George B. Collins*.

Lee A. Freeman, Jr., Special Assistant Attorney General of Illinois, argued the cause for respondents. With him on the brief was *William J. Scott*, Attorney General.

Assistant Attorney General Baker argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Friedman* and *Carl D. Lawson*.*

**Evelle J. Younger*, Attorney General, *Sanford N. Gruskin*, Chief Assistant Attorney General, *Warren J. Abbott*, Assistant Attorney General, and *Michael I. Spiegel* and *Richard N. Light*, Deputy Attorneys General, filed a brief for the State of California as *amicus curiae* urging affirmance.

A brief of *amici curiae* urging affirmance was filed by the Attorneys General and other officials for their respective States as follows: *Bruce E. Babbitt*, Attorney General, *John A. Baade*, Assistant Attorney General, and *Kenneth R. Reed*, of Arizona; *William J. Baxley*, Attorney General, and *William T. Stephens*, Assistant Attorney General, of Alabama; *Avrum M. Gross*, Attorney General, and *Joseph K. Donohue*, Assistant Attorney General, of Alaska; *Bill Clinton*, Attorney General, and *Frank B. Newell*, Deputy Attorney General, of Arkansas; *J. D. MacFarlane*, Attorney General, and *Robert F. Hill*, First Assistant Attorney General, of Colorado; *Carl R. Ajello*, Attorney General, and *Gerard J. Dowling* and *Larry H. Evans*, Assistant Attorneys General, of Connecticut; *Richard R. Wier, Jr.*, Attorney General, and *Regina M. Small*, Deputy Attorney General, of Delaware; *Robert L. Shevin*, Attorney General, and *Charles R. Ranson*, Assistant Attorney General, of Florida; *Arthur K. Bolton*, Attorney General, and *R. Douglas Lackey*, Assistant Attorney General, of Georgia; *Ronald Y. Amemiya*, Attorney General, and *Nelson S. W. Chang*, Deputy Attorney General, of Hawaii; *Wayne L. Kidwell*, Attorney General, and *Rudolf D. Barchas*, Deputy Attorney General, of Idaho; *Theodore L. Sendak*, Attorney General, and *Donald P. Bogard*, of Indiana; *Richard C. Turner*, Attorney General, and *Gary H. Swanson*,

MR. JUSTICE WHITE delivered the opinion of the Court.

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968), involved an antitrust treble-damages action

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Assistant Attorney General, of Iowa; *Curt T. Schneider*, Attorney General, and *Thomas H. Brill*, Assistant Attorney General, of Kansas; *Robert F. Stephens*, Attorney General, and *W. Patrick Stallard*, Assistant Attorney General, of Kentucky; *William J. Guste, Jr.*, Attorney General, and *John R. Flowers, Jr.*, Assistant Attorney General, of Louisiana; *Joseph E. Brennan*, Attorney General, and *Cheryl Harrington*, Assistant Attorney General, of Maine; *Francis B. Burch*, Attorney General, and *Thomas M. Wilson III*, Assistant Attorney General, of Maryland; *Francis X. Bellotti*, Attorney General, and *Paula W. Gold*, Assistant Attorney General, of Massachusetts; *Frank J. Kelley*, Attorney General, and *Edwin M. Bladen*, Assistant Attorney General, of Michigan; *Warren R. Spannaus*, Attorney General, and *Alan H. Maclin*, Special Assistant Attorney General, of Minnesota; *A. F. Summer*, Attorney General, and *Donald Clark, Jr.*, Special Assistant Attorney General, of Mississippi; *John Ashcroft*, Attorney General of Missouri; *Michael T. Greely*, Attorney General, and *Mike McGrath*, Assistant Attorney General, of Montana; *Paul L. Douglas*, Attorney General, and *Robert F. Bartle*, Assistant Attorney General, of Nebraska; *Robert List*, Attorney General, and *Donald Klasic*, Deputy Attorney General, of Nevada; *David H. Souter*, Attorney General, and *Wilfred John Funk*, Assistant Attorney General, of New Hampshire; *William F. Hyland*, Attorney General, and *Elias Abelson*, of New Jersey; *Toney Anaya*, Attorney General, and *Robert N. Hilgendorf*, Assistant Attorney General, of New Mexico; *Louis J. Lefkowitz*, Attorney General, and *John M. Desiderio*, Assistant Attorney General, of New York; *Rufus L. Edmisten*, Attorney General, and *G. Jona Poe, Jr.*, Special Deputy Attorney General, of North Carolina; *Allen I. Olson*, Attorney General, and *Lynn E. Erickson*, Assistant Attorney General, of North Dakota; *Larry Derryberry*, Attorney General, and *Paul C. Duncan*, Assistant Attorney General, of Oklahoma; *James A. Redden*, Attorney General of Oregon; *Robert P. Kane*, Attorney General, and *Vincent X. Yakowicz*, Solicitor General, of Pennsylvania; *Julius C. Michaelson*, Attorney General of Rhode Island; *Daniel R. McLeod*, Attorney General, and *Victor S. Evans*, Deputy Attorney General, of South Carolina; *William J. Janklow*, Attorney General, and *Thomas J. Welk*, Assistant Attorney General, of South Dakota; *Brooks McLemore*, Attorney General of Tennessee; *John L. Hill*, Attorney General, and *Lee C. Clyburn*, of Texas; *Robert B. Hansen*, Attorney General, and *William T. Evans*, Assistant Attorney General, of Utah; *M. Jerome Diamond*, Attorney General, and *Jay I. Ashman*,

brought under § 4 of the Clayton Act [1] against a manufacturer of shoe machinery by one of its customers, a manufacturer of shoes. In defense, the shoe machinery manufacturer sought to show that the plaintiff had not been injured in its business as required by § 4 because it had passed on the claimed illegal overcharge to those who bought shoes from it. Under the defendant's theory, the illegal overcharge was absorbed by the plaintiff's customers—indirect purchasers of the defendant's shoe machinery—who were the persons actually injured by the antitrust violation.

In *Hanover Shoe* this Court rejected as a matter of law this defense that indirect rather than direct purchasers were the parties injured by the antitrust violation. The Court held that, except in certain limited circumstances,[2] a direct purchaser suing for treble damages under § 4 of the Clayton Act is injured within the meaning of § 4 by the full amount of the overcharge paid by it and that the antitrust defendant is

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Assistant Attorney General, of Vermont; *Anthony F. Troy*, Chief Deputy Attorney General, and *John J. Miles*, Assistant Attorney General, of Virginia; *Slade Gorton*, Attorney General, and *Thomas L. Boeder*, Assistant Attorney General, of Washington; *Chauncey H. Browning, Jr.*, Attorney General, and *Gene Hal Williams*, Deputy Attorney General, of West Virginia; *Bronson C. LaFollette*, Attorney General, and *Michael L. Zaleski*, Assistant Attorney General, of Wisconsin; *V. Frank Mendicino*, Attorney General, *Charles J. Carroll*, Deputy Attorney General, and *Jim Gusea*, Assistant Attorney General, of Wyoming.

[1] Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[2] The Court cited, as an example of when a pass-on defense might be permitted, the situation where "an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged . . . ." 392 U. S., at 494. See *infra*, at 735–736.

not permitted to introduce evidence that indirect purchasers were in fact injured by the illegal overcharge. 392 U. S., at 494. The first reason for the Court's rejection of this offer of proof was an unwillingness to complicate treble-damages actions with attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge. *Id.*, at 492–493.[3] A second reason for barring the pass-on defense was the Court's concern that unless direct purchasers were allowed to sue for the portion of the overcharge arguably passed on to indirect purchasers, antitrust violators "would retain the fruits of their illegality"

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[3] The Court explained the economic uncertainties and complexities involved in proving pass-on as follows:

"A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories." 392 U. S., at 492–493. (Footnote omitted.)

because indirect purchasers "would have only a tiny stake in the lawsuit" and hence little incentive to sue. *Id.*, at 494.

In this case we once again confront the question whether the overcharged direct purchaser should be deemed for purposes of § 4 to have suffered the full injury from the overcharge; but the issue is presented in the context of a suit in which the plaintiff, an indirect purchaser, seeks to show its injury by establishing pass-on by the direct purchaser and in which the antitrust defendants rely on *Hanover Shoe*'s rejection of the pass-on theory. Having decided that in general a pass-on theory may not be used defensively by an antitrust violator against a direct purchaser plaintiff, we must now decide whether that theory may be used offensively by an indirect purchaser plaintiff against an alleged violator.

I

Petitioners manufacture and distribute concrete block in the Greater Chicago area. They sell the block primarily to masonry contractors, who submit bids to general contractors for the masonry portions of construction projects. The general contractors in turn submit bids for these projects to customers such as the respondents in this case, the State of Illinois and 700 local governmental entities in the Greater Chicago area, including counties, municipalities, housing authorities, and school districts. See 67 F. R. D. 461, 463 (ND Ill. 1975); App. 16–48. Respondents are thus indirect purchasers of concrete block, which passes through two separate levels in the chain of distribution before reaching respondents. The block is purchased directly from petitioners by masonry contractors and used by them to build masonry structures; those structures are incorporated into entire buildings by general contractors and sold to respondents.

Respondent State of Illinois, on behalf of itself and respondent local governmental entities, brought this antitrust treble-damages action under § 4 of the Clayton Act, alleging that

petitioners had engaged in a combination and conspiracy to fix the prices of concrete block in violation of § 1 of the Sherman Act.[4] The complaint alleged that the amounts paid by respondents for concrete block were more than $3 million higher by reason of this price-fixing conspiracy. The only way in which the antitrust violation alleged could have injured respondents is if all or part of the overcharge was passed on by the masonry and general contractors to respondents, rather than being absorbed at the first two levels of distribution. See *Illinois* v. *Ampress Brick Co.*, 536 F. 2d 1163, 1164 (CA7 1976).[5]

Petitioner manufacturers moved for partial summary judgment against all plaintiffs that were indirect purchasers of concrete block from petitioners, contending that as a matter of law only direct purchasers could sue for the alleged overcharge.[6] The District Court granted petitioners' motion, but the Court of Appeals reversed, holding that indirect purchasers such as respondents in this case can recover treble damages for an illegal overcharge if they can prove that the overcharge

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[4] Section 1 of the Sherman Act, c. 647, 26 Stat. 209, as amended, 15 U. S. C. § 1, provides in relevant part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . ."

[5] Private treble-damages actions brought by masonry contractors, general contractors, and private builders were settled, without prejudice to this suit. 536 F. 2d, at 1164.

[6] The responses to petitioners' interrogatories indicated that only four of the plaintiffs represented by the State purchased concrete block directly from one of the petitioners. 67 F. R. D. 461, 463 (ND Ill. 1975). Only 7% of the 700 public entities named as plaintiffs were apparently able to state the cost of the concrete block used in their building projects. Brief for Petitioners 5 n. **. In the only example cited to us by the parties, the cost of the concrete block was reported as less than one-half of one percent of the total cost of the project. *Id.*, at 21 n. *.

was passed on to them through intervening links in the distribution chain.[7]

We granted certiorari, 429 U. S. 938 (1976), to resolve a conflict among the Courts of Appeals [8] on the question whether the offensive use of pass-on authorized by the decision below is consistent with *Hanover Shoe*'s restrictions on the defensive use of pass-on. We hold that it is not, and we reverse. We reach this result in two steps. First, we conclude that whatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants. Because *Hanover Shoe* would bar petitioners from using respondents' pass-on theory as a defense to a treble-damages suit

[7] The District Court based its grant of summary judgment against the indirect purchaser plaintiffs not on the ground that this Court's construction of § 4 in *Hanover Shoe* barred their attempt to show that the masonry and general contractors passed on the overcharge to them, but rather on the ground that these indirect purchasers lacked standing to sue for an overcharge on one product—concrete block—that was incorporated by the masonry and general contractors into an entirely new and different product—a building. 67 F. R. D., at 467–468. Although the Court of Appeals held that these indirect purchasers did have standing to sue for damages under § 4, it agreed with the District Court's reading of *Hanover Shoe*. 536 F. 2d, at 1164–1167. Because we find *Hanover Shoe* dispositive here, we do not address the standing issue, except to note, as did the Court of Appeals below, 536 F. 2d, at 1166, that the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4. See Handler & Blechman, Antitrust and the Consumer Interest: The Fallacy of *Parens Patriae* and A Suggested New Approach, 85 Yale L. J. 626, 644–645 (1976).

[8] Compare *Mangano* v. *American Radiator & Standard Sanitary Corp.*, 438 F. 2d 1187 (CA3 1971), aff'g *Philadelphia Housing Auth.* v. *American Radiator & Standard Sanitary Corp.*, 50 F. R. D. 13 (ED Pa. 1970), with *In re Western Liquid Asphalt Cases*, 487 F. 2d 191 (CA9 1973), cert. denied *sub nom. Standard Oil Co. of Cal.* v. *Alaska*, 415 U. S. 919 (1974); *West Virginia* v. *Chas. Pfizer & Co.*, 440 F. 2d 1079 (CA2), cert. denied *sub nom. Cotler Drugs, Inc.* v. *Chas. Pfizer & Co.*, 404 U. S. 871 (1971), and the decision below, *Illinois* v. *Ampress Brick Co.*, 536 F. 2d 1163.

by the direct purchasers (the masonry contractors),[9] we are faced with the choice of overruling (or narrowly limiting) *Hanover Shoe* or of applying it to bar respondents' attempt to use this pass-on theory offensively. Second, we decline to abandon the construction given § 4 in *Hanover Shoe*—that the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party "injured in his business or property" within the meaning of the section—in the absence of a convincing demonstration that the Court was wrong in *Hanover Shoe* to think that the effectiveness of the antitrust treble-damages action would be substantially reduced by adopting a rule that any party in the chain may sue to recover the fraction of the overcharge allegedly absorbed by it.

II

The parties in this case agree that however § 4 is construed with respect to the pass-on issue, the rule should apply equally to plaintiffs and defendants—that an indirect purchaser should not be allowed to use a pass-on theory to recover damages from a defendant unless the defendant would be allowed to use a pass-on defense in a suit by a direct purchaser. Respondents, in arguing that they should be allowed to recover by showing pass-on in this case, have conceded that petitioners should be allowed to assert a pass-on defense against direct purchasers of concrete block, Tr. of Oral Arg. 33, 48; they ask this Court to limit *Hanover Shoe*'s bar on pass-on defenses to its "particular factual context" of overcharges for capital goods used to manufacture new products. *Id.*, at 41; see *id.*, at 36, 47–48.

Before turning to this request to limit *Hanover Shoe*, we consider the substantially contrary position, adopted by our dissenting Brethren, by the United States as *amicus curiae*, and by lower courts that have allowed offensive use of pass-on, that the unavailability of a pass-on theory to a defendant

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[9] See *infra*, at 734–735.

should not necessarily preclude its use by plaintiffs seeking treble damages against that defendant.[10] Under this view, *Hanover Shoe*'s rejection of pass-on would continue to apply to defendants unless direct and indirect purchasers were both suing the defendant in the same action; but it would not bar indirect purchasers from attempting to show that the overcharge had been passed on to them. We reject this position for two reasons.

First, allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants. Even though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge that the indirect purchaser had shown to be passed on; similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount. The risk of duplicative recoveries created by unequal application of the *Hanover Shoe* rule is much more substantial than in the more usual situation where the defendant is sued in two different lawsuits by plaintiffs asserting conflicting claims to the same fund. A one-sided application of *Hanover Shoe* substantially increases the possibility of inconsistent adjudications—and therefore of unwarranted multiple liability for the defendant—by *presuming* that one plaintiff (the direct purchaser) is entitled to full recovery while preventing the defendant from using that presumption against the other plaintiff; overlapping recoveries are certain to result from the two law-

[10] *Post*, at 753 (BRENNAN, J., dissenting); *post*, at 765–766 (BLACKMUN, J., dissenting); Brief for United States as *Amicus Curiae* 4–6, 15–21; Tr. of Oral Arg. 50–54, 57–60; *West Virginia* v. *Chas. Pfizer & Co.*, 440 F. 2d, at 1086–1088; *Boshes* v. *General Motors Corp.*, 59 F. R. D. 589, 592–598 (ND Ill. 1973); *In re Master Key Antitrust Litigation*, 1973–2 Trade Cas. ¶ 74,680, p. 94,978 (Conn.); *Carnivale Bag Co.* v. *Slide-Rite Mfg. Corp.*, 395 F. Supp. 287, 290–291 (SDNY 1975). See also Brief for State of California as *Amicus Curiae* 6–12.

suits unless the indirect purchaser is unable to establish any pass-on whatsoever. As in *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U. S. 251, 264 (1972), we are unwilling to "open the door to duplicative recoveries" under § 4.[11]

Second, the reasoning of *Hanover Shoe* cannot justify unequal treatment of plaintiffs and defendants with respect to the permissibility of pass-on arguments. The principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and out-

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[11] In recognition of the need to avoid duplicative recoveries, courts adopting the view that pass-on theories should not be equally available to plaintiffs and defendants have agreed that defendants should be allowed to assert a pass-on defense against a direct purchaser if an indirect purchaser is also attempting to recover on a pass-on theory *in the same lawsuit*. *E. g.*, *In re Western Liquid Asphalt Cases*, 487 F. 2d, at 200–201; *West Virginia* v. *Chas. Pfizer & Co.*, 440 F. 2d, at 1088. See also Comment, Standing to Sue in Antitrust Cases: The Offensive Use of Passing-On, 123 U. Pa. L. Rev. 976, 995–998 (1975); Comment, *Mangano* and Ultimate-Consumer Standing: The Misuse of the *Hanover* Doctrine, 72 Colum. L. Rev. 394, 410 (1972); Brief for United States as *Amicus Curiae* 25. Various procedural devices, such as the Multidistrict Litigation Act, 28 U. S. C. § 1407, and statutory interpleader, 28 U. S. C. § 1335, are relied upon to bring indirect and direct purchasers together in one action in order to apportion damages among them and thereby reduce the risk of duplicative recovery. These procedural devices cannot protect against multiple liability where the direct purchasers have already recovered by obtaining a judgment or by settling, as is more likely (and as occurred here, see n. 5, *supra*); acknowledging that the risk of multiple recoveries is inevitably increased by allowing offensive but not defensive use of pass-on, *e. g.*, Comment, 123 U. Pa. L. Rev., *supra*, at 994, proponents of this approach ultimately fall back on the argument that it is better for the defendant to pay sixfold or more damages than for an injured party to go uncompensated. *E. g.*, Comment, 72 Colum. L. Rev., *supra*, at 411; Tr. of Oral Arg. 58 ("a little slopover on the shoulders of the wrongdoers . . . is acceptable"). We do not find this risk acceptable.

Moreover, even if ways could be found to bring all potential plaintiffs together in one huge action, the complexity thereby introduced into treble-damages proceedings argues strongly for retaining the *Hanover Shoe* rule. See Part III, *infra*.

put decisions "in the real economic world rather than an economist's hypothetical model," 392 U. S., at 493, and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom.[12] This perception that the attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble-damages proceedings applies with no less force to the assertion of pass-on theories by plaintiffs than it does to the assertion by defendants. However "long and complicated" the proceedings would be when defendants sought to prove pass-on, *ibid.*, they would be equally so when the same evidence was introduced by plaintiffs. Indeed, the evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution. The demonstration of how much of the overcharge was passed on by the first purchaser must be repeated at each point at which

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[12] That this rationale was more important in the decision to bar the pass-on defense than the second reason—the concern that if pass-on defenses were permitted indirect purchasers would lack the incentive to sue and antitrust violators would retain their ill-gotten gains, see *supra*, at 725–726, is shown by the fact that the Court recognized an exception for pre-existing cost-plus contracts, which "mak[e] it *easy to prove* that [the direct purchaser] has not been damaged." 392 U. S., at 494. (Emphasis added.) The amount of the stake that the customers of the direct purchaser have in a lawsuit against the overcharger is not likely to depend on whether they buy under a cost-plus contract or in a competitive market, but the Court allowed a pass-on defense in the former situation because the pre-existing cost-plus contract makes easy the normally complicated task of demonstrating that the overcharge has not been absorbed by the direct purchaser. See Note, The Effect of Hanover Shoe on the Offensive Use of the Passing-on Doctrine, 46 So. Cal. L. Rev. 98, 108 (1972).

the price-fixed goods changed hands before they reached the plaintiff.[13]

It is argued, however, that *Hanover Shoe* rests on a policy of ensuring that a treble-damages plaintiff is available to deprive antitrust violators of "the fruits of their illegality," *id.*, at 494, a policy that would be furthered by allowing plaintiffs but not defendants to use pass-on theories. See, *e. g.*, *In re Western Liquid Asphalt Cases*, 487 F. 2d 191, 197 (CA9 1973), cert. denied *sub nom. Standard Oil Co. of Cal.* v. *Alaska*, 415 U. S. 919 (1974); Brief for United States as *Amicus Curiae* 4–6, 12–13, 17–19.[14] We do not read the Court's

[13] Offensive use of pass-on by the last purchaser in the distribution chain is simpler in one respect than defensive use of pass-on against a direct purchaser that sells a product to other customers. In the latter case, even if the defendant shows that as a result of the overcharge the direct purchaser increased its price by the full amount of the overcharge, the direct purchaser may still claim injury from a reduction in the volume of its sales caused by its higher prices. This additional element of injury from reduced volume is not present in the suit by the final purchaser of the overcharged goods, where the issue regarding injury will be whether the defendant's overcharge caused the plaintiff to pay a higher price for whatever it purchased. But the final purchaser still will have to trace the overcharge through each step in the distribution chain. In our view, the difficulty of reconstructing the pricing decisions of intermediate purchasers at each step in the chain beyond the direct purchaser generally will outweigh any gain in simplicity from not having to litigate the effects of the passed-on overcharge on the direct purchaser's volume.

[14] We are urged to defer to evidence in the legislative history of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394–1396, 15 U. S. C. § 15c *et seq.* (1976 ed.), that Congress understood *Hanover Shoe* as applying only to defendants. *Post*, at 756–758 (BRENNAN, J., dissenting); Brief for 47 States as *Amici Curiae* 14–15, n. 6; Brief for United States as *Amicus Curiae* 14–15, and n. 12. The House Report (apparently viewing the issue as one of standing, cf. n. 7, *supra*) endorsed the Ninth Circuit's view of "the pro-enforcement thrust of *Hanover Shoe*" in *In re Western Liquid Asphalt Cases*, *supra*, and criticized lower court decisions barring pass-on arguments by plaintiffs. H. R. Rep. No. 94–499, p. 6 n. 4 (1975). In addition, one of the sponsors of this legislation, Representative Rodino, clearly assumed that the issue of offensive use of

concern in *Hanover Shoe* for the effectiveness of the treble-damages remedy as countenancing unequal application of the Court's pass-on rule. Rather, we understand *Hanover Shoe*

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pass-on under § 4 would be resolved favorably to plaintiffs by this Court. See 122 Cong. Rec. H10295 (daily ed., Sept. 16, 1976).

Congress made clear, however, that this legislation did not alter the definition of which overcharged persons were injured within the meaning of § 4. It simply created a new procedural device—*parens patriae* actions by States on behalf of their citizens—to enforce existing rights of recovery under § 4. The House Report quoted above stated that the *parens patriae* provision "creates no new substantive liability"; the relevant language of the newly enacted § 4C (a) of the Clayton Act tracks that of existing § 4, showing that it was intended only as "an alternative means . . . for the vindication of existing substantive claims." H. R. Rep. No. 94-499, *supra*, at 9. "The establishment of an alternative remedy does not increase any defendant's liability." *Ibid.* Representative Rodino himself acknowledged in the remarks cited above that this legislation did not create a right of recovery for consumers where one did not already exist.

We thus cannot agree with the dissenters that the legislative history of the 1976 Antitrust Improvements Act is dispositive as to the interpretation of § 4 of the Clayton Act, enacted in 1914, or the predecessor section of the Sherman Act, enacted in 1890. *Post*, at 756–758. The cases cited by MR. JUSTICE BRENNAN, *post*, at 765 n. 24, to support his reliance on this legislation all involved specific statutory language that was thought to clarify the meaning of an earlier statute. *E. g., Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381 (1969) (language in 1959 amendment to § 315 of the Communications Act approved fairness doctrine adopted by FCC under the "public interest" standard of the original Act). Here, by contrast, Congress borrowed the language of § 4 in adding the *parens patriae* section. The views expressed by particular legislators as to the meaning of that language in § 4 "cannot serve to change the legislative intent of Congress . . . 'since the statements were [made] after passage of the [Clayton] Act.'" *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 132 (1974), quoting *National Woodwork Mfrs. Assn.* v. *NLRB*, 386 U. S. 612, 639 n. 34 (1967).

While we do not lightly disagree with the reading of *Hanover Shoe* urged by these legislators, we think the construction of § 4 adopted in that decision cannot be applied for the exclusive benefit of plaintiffs. Should Congress disagree with this result, it may, of course, amend the section to change it. But it has not done so in the recent *parens patriae* legislation.

as resting on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it.

We thus decline to construe § 4 to permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense in an action by direct purchasers. In this case, respondents seek to demonstrate that masonry contractors, who incorporated petitioners' block into walls and other masonry structures, passed on the alleged overcharge on the block to general contractors, who incorporated the masonry structures into entire buildings, and that the general contractors in turn passed on the overcharge to respondents in the bids submitted for those buildings. We think it clear that under a fair reading of *Hanover Shoe* petitioners would be barred from asserting this theory in a suit by the masonry contractors.

In *Hanover Shoe* this Court did not endorse the broad exception that had been recognized in that case by the courts below—permitting the pass-on defense against middlemen who did not alter the goods they purchased before reselling them.[15] The masonry contractors here could not be included under this exception in any event, because they transform the concrete block purchased from defendants into the masonry portions of buildings. But this Court in *Hanover Shoe*

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[15] In a separate trial pursuant to Fed. Rule Civ. Proc. 42 (b), the District Court held that the defendant shoe machinery manufacturer was not permitted to assert a pass-on defense against its customer. 185 F. Supp. 826 (MD Pa.), aff'd, 281 F. 2d 481 (CA3), cert. denied, 364 U. S. 901 (1960). The District Court indicated that pass-on defenses were barred against "consumers" who use the defendant's product to make their own but not against "middlemen" who simply resell the defendant's product. 185 F. Supp., at 830–831. Both on interlocutory appeal and after trial on the merits, the Court of Appeals affirmed on the basis of the District Court's reasoning. See 392 U. S., at 488 n. 6.

indicated the narrow scope it intended for any exception to its rule barring pass-on defenses by citing, as the only example of a situation where the defense might be permitted, a pre-existing cost-plus contract. In such a situation, the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case. The competitive bidding process by which the concrete block involved in this case was incorporated into masonry structures and then into entire buildings can hardly be said to circumvent complex market interactions as would a cost-plus contract.[16]

We are left, then, with two alternatives: either we must overrule *Hanover Shoe* (or at least narrowly confine it to its facts), or we must preclude respondents from seeking to recover on their pass-on theory. We choose the latter course.

III

In considering whether to cut back or abandon the *Hanover Shoe* rule, we must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation. See *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974); *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406–408 (1932) (Brandeis, J., dissenting). This presumption of adherence to our prior decisions construing legislative enactments would support our reaffirmance of the *Hanover Shoe*

[16] Another situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer. Cf. *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, 648 (1969); *In re Western Liquid Asphalt Cases*, 487 F. 2d, at 197, 199.

construction of § 4, joined by eight Justices without dissent only a few years ago,[17] even if the Court were persuaded that the use of pass-on theories by plaintiffs and defendants in treble-damages actions is more consistent with the policies underlying the treble-damages action than is the *Hanover Shoe* rule. But we are not so persuaded.

Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.

As we have indicated, potential plaintiffs at each level in the distribution chain are in a position to assert conflicting claims to a common fund—the amount of the alleged overcharge—by contending that the entire overcharge was absorbed at that particular level in the chain.[18] A treble-damages action brought by one of these potential plaintiffs (or one class of potential plaintiffs) to recover the overcharge implicates all three of the interests that have traditionally been thought to support compulsory joinder of absent and potentially adverse claimants: the interest of the defendant in

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[17] The sole dissenting Justice in *Hanover Shoe* did not reach the pass-on question. 392 U. S., at 513.

[18] In this Part, we assume that use of pass-on will be permitted symmetrically, if at all. This assumption, of course, reduces the substantial risk of multiple liability for defendants that is posed by allowing indirect purchasers to recover for the overcharge passed on to them while at the same time allowing direct purchasers automatically to collect the entire overcharge. See *supra*, at 730–731. But the possibility of inconsistent judgments obtained by conflicting claimants remains nonetheless. Even this residual possibility justifies bringing potential and actual claimants together in one action if possible.

avoiding multiple liability for the fund; the interest of the absent potential plaintiffs in protecting their right to recover for the portion of the fund allocable to them; and the social interest in the efficient administration of justice and the avoidance of multiple litigation. Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327, 330 (1957). See *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U. S. 102, 110–111 (1968); 7 C. Wright & A. Miller, Federal Practice and Procedure § 1602 (1972).

Opponents of the *Hanover Shoe* rule have recognized this need for compulsory joinder in suggesting that the defendant could interplead potential claimants under 28 U. S. C. § 1335.[19] But if the defendant, for any of a variety of reasons,[20] does not choose to interplead the absent potential claimants, there would be a strong argument for joining them as "persons needed for just adjudication" under Fed. Rule Civ. Proc. 19 (a).[21] See Comment, Standing to Sue in Antitrust Cases:

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[19] See n. 11, *supra*. Interpleader under Fed. Rule Civ. Proc. 22 (1) often would be unavailable because service of process for rule interpleader, as contrasted with statutory interpleader, does not run nationwide. See 3A J. Moore, Federal Practice ¶ 22.04[2] (1974).

[20] For example, a condition precedent for invoking statutory interpleader is the posting of a bond for the amount in dispute, 28 U. S. C. § 1335 (a) (2), see 3A J. Moore, *supra*, ¶ 22.10, and a defendant may be unwilling to put up a bond for the huge amounts normally claimed in multiple-party treble-damages suits. For a discussion of other circumstances in which statutory interpleader may be "impractical," see McGuire, The Passing-On Defense and the Right of Remote Purchasers to Recover Treble Damages under Hanover Shoe, 33 U. Pitt. L. Rev. 177, 197–198 (1971).

[21] Rule 19 (a) provides in part:

"A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter

The Offensive Use of Passing-On, 123 U. Pa. L. Rev. 976, 998 (1975). These absent potential claimants would seem to fit the classic definition of "necessary parties," for purposes of compulsory joinder, given in *Shields* v. *Barrow*, 17 How. 130, 139 (1855):

> "Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it."

See Notes of Advisory Committee on 1966 Amendment to Rule 19, 28 U. S. C. App., p. 7760; 7 C. Wright & A. Miller, *supra*, §§ 1604, 1618; 3A J. Moore, Federal Practice ¶ 19.08 (1974). The plaintiff bringing the treble-damages action would be required, under Fed. Rule Civ. Proc. 19 (c), to "state the names, if known," of these absent potential claimants; they should also be notified by some means that the action was pending.[22] Where, as would often be the case, the potential claimants at a particular level of distribution are so numerous that joinder of all is impracticable, a representative presumably would have to be found to bring them into the action as a class. See Fed. Rule Civ. Proc. 19 (d); 3A J. Moore, *supra*, ¶ 19.21.

It is unlikely, of course, that all potential plaintiffs could or would be joined. Some may not wish to assert claims to the

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impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

[22] See the comment of the Advisory Committee on the 1966 Amendment to Rule 19: "In some situations it may be desirable to advise a person who has not been joined of the fact that the action is pending, and in particular cases the court in its discretion may itself convey this information by directing a letter or other informal notice to the absentee." 28 U. S. C. App., p. 7760.

overcharge; others may be unmanageable as a class; and still others may be beyond the personal jurisdiction of the court. We can assume that ordinarily the action would still proceed, the absent parties not being deemed "indispensable" under Fed. Rule Civ. Proc. 19 (b). See *Provident Tradesmens Bank & Trust Co.* v. *Patterson, supra.* But allowing indirect purchasers to recover using pass-on theories, even under the optimistic assumption that joinder of potential plaintiffs will deal satisfactorily with problems of multiple litigation and liability, would transform treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant. In treble-damages actions by ultimate consumers, the overcharge would have to be apportioned among the relevant wholesalers, retailers, and other middlemen, whose representatives presumably should be joined.[23] And in suits

[23] *E. g., Philadelphia Housing Auth.* v. *American Radiator & Standard Sanitary Corp.*, 50 F. R. D. 13 (ED Pa. 1970), aff'd *sub nom. Mangano* v. *American Radiator & Standard Sanitary Corp.*, 438 F. 2d 1187 (CA3 1971) (suit against manufacturers of plumbing fixtures on behalf of all homeowners in the United States). There often will be more levels of distribution or manufacture between the defendant and the ultimate consumers than the two levels (masonry and general contractors) in this case. For example, in *Philadelphia Housing Auth., supra,* the plaintiffs included homeowners who had bought used rather than new homes and who therefore had to show that each time their houses changed hands the sellers passed on part of the plumbing manufacturers' original overcharge. 50 F. R. D., at 19–20, 25–26. Treble-damages suits by ultimate consumers against any of the manufacturers of industrial raw materials or equipment that have been charged in recent Government price-fixing suits would involve not only several levels within a distribution chain, but also several separate chains of distribution; for example, chromite sand is used to make ingots, ingots are used to make steel, and steel is used to make consumer products. Handler & Blechman, *supra* n. 7, at 640 n. 77, and see *id.*, at 636–637 (citing Justice Department price-fixing suits against defendants far removed from consumers).

by direct purchasers or middlemen, the interests of ultimate consumers are similarly implicated.[24]

There is thus a strong possibility that indirect purchasers remote from the defendant would be parties to virtually every treble-damages action (apart from those brought against defendants at the retail level). The Court's concern in *Hanover Shoe* to avoid weighing down treble-damages actions with the "massive evidence and complicated theories," 392 U. S., at 493, involved in attempting to establish a pass-on defense against a direct purchaser applies *a fortiori* to the attempt to trace the effect of the overcharge through each step in the distribution chain from the direct purchaser to the ultimate consumer. We are no more inclined than we were in *Hanover Shoe* to ignore the burdens that such an attempt would impose on the effective enforcement of the antitrust laws.

Under an array of simplifying assumptions, economic theory provides a precise formula for calculating how the overcharge is distributed between the overcharged party (passer) and its customers (passees). *If* the market for the passer's product is perfectly competitive; *if* the overcharge is imposed equally on all of the passer's competitors; and *if* the passer maximizes its profits, then the ratio of the shares of the overcharge borne by passee and passer will equal the ratio of the elasticities of supply and demand in the market for the passer's product.[25]

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[24] *E. g., Donson Stores, Inc.* v. *American Bakeries Co.*, 58 F. R. D. 481 (SDNY 1973) (motion to intervene by a putative class of 20 million consumers of bread in treble-damages action against bread manufacturers). Cf. Handler & Blechman, *supra*, n. 7, at 653 (arguing that the effect of legislation authorizing States to bring treble-damages actions on behalf of their citizens, see n. 14, *supra*, will be to interject claims on behalf of large classes of consumers into treble-damages suits brought by middlemen). Thus in this case the plaintiff housing authorities, App. 20, presumably have passed on part of the alleged overcharge to their tenants and subtenants, who would have to be brought into the suit before damages could be fairly apportioned.

[25] An overcharge imposed by an antitrust violator or group of violators

Even if these assumptions are accepted, there remains a serious problem of measuring the relevant elasticities—the percentage change in the quantities of the passer's product demanded and supplied in response to a one percent change in price. In view of the difficulties that have been encountered, even in informal adversary proceedings, with the statistical techniques used to estimate these concepts, see Finkelstein, Regression Models in Administrative Proceedings, 86 Harv. L. Rev. 1442, 1444 (1973), it is unrealistic to think that elasticity studies introduced by expert witnesses will resolve the pass-on issue. We need look no further than our own difficulties with sophisticated statistical methodology that were evident last Term in *Gregg* v. *Georgia*, 428 U. S. 153 (1976), and its companion cases. See *id.*, at 184–185 (joint opinion of STEWART, POWELL, and STEVENS, JJ.); 233–236 (MARSHALL, J., dissenting); *Roberts* v. *Louisiana*, 428 U. S. 325, 354–355 (1976) (WHITE, J., dissenting).

More important, as the *Hanover Shoe* Court observed, 392 U. S., at 493, "in the real economic world rather than an economist's hypothetical model," the latter's drastic simplifications generally must be abandoned. Overcharged direct purchasers often sell in imperfectly competitive markets. They often compete with other sellers that have not been subject to the overcharge; and their pricing policies often cannot be explained solely by the convenient assumption of profit maximization.[26] As we concluded in *Hanover Shoe*, 392 U. S., at 492,

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on their customers is analytically equivalent to an excise tax imposed on the violator's product in the amount of the overcharge. The effect of such an overcharge can be calculated using the economic theorems for the incidence of an excise tax. See Schaefer, Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis, 16 Wm. & Mary L. Rev. 883, 887, 893 (1975), and sources cited in *id.*, at 887 n. 21.

[26] Thus, in the instant case respondents have offered to prove that general and masonry contractors calculate their bids by adding a percentage markup to the cost of their materials, Brief for Respondents 20–23,

attention to "sound laws of economics" can only heighten the awareness of the difficulties and uncertainties involved in determining how the relevant market variables would have behaved had there been no overcharge.[27]

It is quite true that these difficulties and uncertainties will be less substantial in some contexts than in others. There have been many proposals to allow pass-on theories in some of these contexts while preserving the *Hanover Shoe* rule in others. Respondents here argue, not without support from some lower courts,[28] that pass-on theories should be permitted for middlemen that resell goods without altering them and for contractors that add a fixed percentage markup to the cost of their materials in submitting bids. Brief for Respondents 9–30; Tr. of Oral Arg. 36–48. Exceptions to the *Hanover Shoe* rule have also been urged for other situations in which most of the overcharge is purportedly passed on—for example, where a price-fixed good is a small but vital input into a

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rather than by attempting to equate marginal cost and marginal revenue as required by an explicit profit-maximizing strategy.

[27] MR. JUSTICE BRENNAN in dissent argues that estimating a passee's damages requires nothing more than estimating what the passer's price would have been absent the violation, and suggests that apportioning the overcharge throughout the distribution chain is "no different from and no more complicated" than the initial task of estimating the amount of the overcharge itself. *Post*, at 758–759, and n. 14. But as the dissent recognizes, *post*, at 749 n. 3, unless the indirect purchaser is at the end of the distribution chain it can claim damages not only from the portion of the overcharge it absorbs but also from the portion it passes on, which causes a reduction in sales volume under less than perfectly inelastic demand conditions. See n. 13, *supra*. The difficulties of the task urged upon us by the dissenters cannot be so easily brushed aside.

In any event, as we understand the dissenters' argument, it reduces to the proposition that because antitrust cases are already complicated there is little harm in making them more so. We disagree.

[28] See, *e. g.*, *West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710, 745–746 (SDNY 1970), aff'd, 440 F. 2d 1079 (CA2 1971); *Boshes* v. *General Motors Corp.*, 59 F. R. D., at 597.

much larger product, making the demand for the price-fixed good highly inelastic. Compare *Philadelphia Housing Auth.* v. *American Radiator & Standard Sanitary Corp.*, 50 F. R. D. 13 (ED Pa. 1970), aff'd *sub nom. Mangano* v. *American Radiator & Standard Sanitary Corp.*, 438 F. 2d 1187 (CA3 1971), with *In re Master Key Antitrust Litigation*, 1973-2 Trade Cas. ¶ 74,680 (Conn.). See *Schaefer, supra* n. 25, at 918–925.

We reject these attempts to carve out exceptions to the *Hanover Shoe* rule for particular types of markets.[29] An exception allowing evidence of pass-on by middlemen that resell the goods they purchase of course would be of no avail to respondents, because the contractors that allegedly passed on the overcharge on the block incorporated it into buildings. See *supra*, at 735. An exception for the contractors here on the ground that they purport to charge a fixed percentage above their costs would substantially erode the *Hanover Shoe* rule without justification. Firms in many sectors of the economy rely to an extent on cost-based rules of thumb in setting prices. See F. Scherer, Industrial Market Structure and Economic Performance 173–179 (1970). These rules are not adhered to rigidly, however; the extent of the markup (or the allocation of costs) is varied to reflect demand conditions. *Id.*, at 176–177. The intricacies of tracing the effect of an overcharge on the purchaser's prices, costs, sales, and profits thus are not spared the litigants.

More generally, the process of classifying various market situations according to the amount of pass-on likely to be

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[29] We note that supporters of the offensive use of pass-on, other than litigants in particular cases, generally have not contended for a halfway rejection of *Hanover Shoe* that would permit offensive use of pass-on in some types of market situations but not in others. See, *e. g.*, Tr. of Oral Arg. 57 (United States as *amicus curiae*); Note, The Defense of "Passing On" in Treble Damage Suits Under the Antitrust Laws, 70 Yale L. J. 469, 476, 478 (1961); commentators cited in n. 11, *supra*.

involved and its susceptibility of proof in a judicial forum would entail the very problems that the *Hanover Shoe* rule was meant to avoid. The litigation over where the line should be drawn in a particular class of cases would inject the same "massive evidence and complicated theories" into treble-damages proceedings, albeit at a somewhat higher level of generality. As we have noted, *supra*, at 735–736, *Hanover Shoe* itself implicitly discouraged the creation of exceptions to its rule barring pass-on defenses, and we adhere to the narrow scope of exemption indicated by our decision there.

The concern in *Hanover Shoe* for the complexity that would be introduced into treble-damages suits if pass-on theories were permitted was closely related to the Court's concern for the reduction in the effectiveness of those suits if brought by indirect purchasers with a smaller stake in the outcome than that of direct purchasers suing for the full amount of the overcharge. The apportionment of the recovery throughout the distribution chain would increase the overall costs of recovery by injecting extremely complex issues into the case; at the same time such an apportionment would reduce the benefits to each plaintiff by dividing the potential recovery among a much larger group. Added to the uncertainty of how much of an overcharge could be established at trial would be the uncertainty of how that overcharge would be apportioned among the various plaintiffs. This additional uncertainty would further reduce the incentive to sue. The combination of increasing the costs and diffusing the benefits of bringing a treble-damages action could seriously impair this important weapon of antitrust enforcement.

We think the longstanding policy of encouraging vigorous private enforcement of the antitrust laws, see, *e. g.*, *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 139 (1968), supports our adherence to the *Hanover Shoe* rule, under which direct purchasers are not only spared the burden

of litigating the intricacies of pass-on but also are permitted to recover the full amount of the overcharge. We recognize that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers.[30] But on balance, and until there are clear directions from Congress to the contrary, we conclude that the legislative purpose in creating a group of "'private attorneys general'" to enforce the antitrust laws under § 4, *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U. S., at 262, is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it.

It is true that, in elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations. Of course, as MR. JUSTICE BRENNAN points out in dissent, "from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as some one redresses the violation." *Post*, at 760. But § 4 has another purpose in addition to deterring violators and depriving them of "the fruits of their illegality," *Hanover Shoe*, 392 U. S., at 494; it is also designed to compensate victims of antitrust violations for their injuries. *E. g., Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 485–486 (1977). *Hanover Shoe* does further the goal of compensation to the extent that the direct purchaser absorbs at least some and often most of the overcharge. In view of the considerations supporting the *Hanover Shoe* rule, we are unwilling to carry the compensation principle to its logical extreme by attempting to allocate damages among all "those within the defendant's chain of distribution," *post*, at 761, especially

[30] See, *e. g., In re Western Liquid Asphalt Cases*, 487 F. 2d, at 198; Wheeler, Antitrust Treble-Damage Actions: Do They Work?, 61 Calif. L. Rev. 1319, 1325 (1973).

because we question the extent to which such an attempt would make individual victims whole for actual injuries suffered rather than simply depleting the overall recovery in litigation over pass-on issues. Many of the indirect purchasers barred from asserting pass-on claims under the *Hanover Shoe* rule have such a small stake in the lawsuit that even if they were to recover as part of a class, only a small fraction would be likely to come forward to collect their damages.[21] And given the difficulty of ascertaining the amount absorbed by any particular indirect purchaser, there is little basis for believing that the amount of the recovery would reflect the actual injury suffered.

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[21] Commentators have noted that recoveries in treble-damages actions aggregating large numbers of small claims often have failed to compensate the individuals on behalf of whom the suits have been brought. *E. g.*, Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits—the Twenty-Third Annual Antitrust Review, 71 Colum. L. Rev. 1, 9–10 (1971); Wheeler, *supra*, n. 30, at 1339; Kirkham, Complex Civil Litigation—Have Good Intentions Gone Awry?, 70 F. R. D. 199, 206–207 (1976).

The dissenting opinion of MR JUSTICE BRENNAN appears to suggest that the 1976 *parens patriae* legislation, see n. 14, *supra*, provides an answer to this problem of compensating indirect purchasers for small injuries. *Post*, at 764 n. 23. Quite to the contrary, the Act "recognizes that rarely, if ever, will all potential claimants actually come forward to secure their share of the recovery," and that "the undistributed portion of the fund . . . will often be substantial." H. R. Rep. No. 94–499, p. 16 (1975). The portion of the fund recovered in a *parens patriae* action that is not used to compensate the actual injuries of antitrust victims is to be used as "a civil penalty . . . deposited with the State as general revenues," Clayton Act § 4E (2), 15 U. S. C. § 15e (2) (1976 ed.), enacted by the 1976 Act, or "for some public purposes benefiting, as closely as possible, the class of injured persons," such as reducing the price of the overcharged goods in future sales. H. R. Rep. No. 94–499, *supra*, at 16. That Congress chose to provide such innovative methods of distributing damages awarded in a *parens patriae* action under newly enacted § 4C of the Clayton Act, 15 U. S. C. § 15c (1976 ed.), does not eliminate the obstacles to compensating indirect purchasers bringing traditional suits under § 4.

For the reasons stated, the judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN join, dissenting.

Respondent State of Illinois brought this treble-damages civil antitrust action under § 4 of the Clayton Act on behalf of itself and various local governmental entities in the Greater Chicago area alleging that an overcharge in the price of concrete block used in the construction of public buildings was made by the petitioners, manufacturers and sellers of concrete block, pursuant to a price-fixing conspiracy in violation of § 1 of the Sherman Act, 15 U. S. C. § 1.[1] Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, broadly provides: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ."

Decisions of the Court defining the reach of § 4 have been consistent with its broad objectives: to compensate victims of antitrust violations and to deter future violations. The Court has stated that § 4 "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . [but] is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948).[2]

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[1] The block was sold to various general and special contractors who had successfully bid to construct public buildings. The State was thus an indirect purchaser of the block.

[2] There is, of course, a point beyond which antitrust defendants should not be held responsible for the remote consequences of their actions. See the discussion in Part III, *infra*, at 760–761.

Today's decision that § 4 affords a remedy only to persons who purchase directly from an antitrust offender is a regrettable retreat from that line of cases. Section 4 was clearly intended to operate to protect individual consumers who purchase through middlemen. Indeed, Congress acted on the premise that § 4 gave a cause of action to indirect as well as direct purchasers when it recently enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394–1396, 15 U. S. C. § 15c *et seq.* (1976 ed.), and authorized state attorneys general to sue as *parens patriae* to recover damages on behalf of citizens of their various States.

Today's decision flouts Congress' purpose and severely undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement. For in many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution.[2] In these instances, the Court's decision frustrates both the compensation and deterrence objectives of the treble-damages action. Injured consumers are precluded from recovering damages from manufacturers, and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers. This frustration of the congressional scheme is in no way mandated by *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968). To the contrary, the same considerations that *Hanover Shoe* held

[2] The portion of an illegal overcharge that a direct purchaser can pass on depends upon the elasticity of demand in the relevant product market. If the market is relatively inelastic, he may pass on a relatively large portion. If demand is relatively elastic, he may not be able to raise his price and will have to absorb the increase, making it up by decreasing other costs or increasing sales volume. It is extremely unlikely that a middleman could pass on the entire cost increase. But rarely would he have to absorb the entire increase. R. Posner, Antitrust Cases, Economic Notes, and Other Materials 147–149 (1974).

required rejection of the defendant's argument there, that because plaintiff had passed on cost increases to consumers in the form of higher prices defendant should be relieved of liability—especially the consideration that it is essential to the public interest to preserve the effectiveness of the private treble-damages action—require affirmance of the decision below construing § 4 to authorize respondents' suit.

I

In *Hanover Shoe, supra,* the Court held that a defendant in a treble-damages action could not escape liability, except in very limited circumstances,[4] by proof that the plaintiff had passed on illegal overcharges to others farther along in the chain of distribution.[5] The defendant in *Hanover Shoe,* United Shoe, argued that Hanover was not entitled to recover damages because the increased price it had paid for United's equipment[6] had in turn been reflected in the increased price at which Hanover had sold its shoes to the consuming public. The Court held that several reasons supported its conclusion that this defense was not available to United despite "the argument that sound laws of economics require" its recognition, 392 U. S., at 492. First, the Court followed earlier cases holding that the "victim of an overcharge is [immediately]

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[4] The opinion recognizes that "there might be situations—for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present." 392 U. S., at 494.

[5] *Hanover Shoe,* did not involve the consumers of the plaintiff's shoes, to whom the overcharge allegedly was passed. United's passing-on argument is referred to as "defensive" passing on. The State's position, seeking recovery of illegal overcharges allegedly passed on to it and its citizens, is referred to as "offensive" passing on.

[6] Hanover alleged that United monopolized the shoe machinery industry in violation of § 2 of the Sherman Act by its practice of leasing but refusing to sell its shoemaking machinery.

damaged within the meaning of § 4 to the extent of that overcharge." *Id.*, at 491. The particularly apt precedent supporting this proposition was *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531 (1918),[7] where a pass-on defense had been rejected because of "[t]he general tendency of the law, in regard to damages at least, . . . not to go beyond the first step," and the Court's belief that "[t]he carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. . . ." *Id.*, at 533–534. In other words, the requirement of privity between plaintiff and defendant was a reason to deny defendant the pass-on defense, since otherwise the defendant would be able to profit by his own wrong. *Hanover Shoe* cannot be read, however, as limiting actions to parties in privity with one another. That was made clear in *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, 648 (1969), decided the next Term, a price discrimination case in which the Court traced an illegal overcharge through several levels in the chain of distribution, ultimately holding that a plaintiff seeking to recover damages need show only a "causal connection between the price discrimination in violation of the [antitrust laws] and the injury suffered. . . . If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury." *Darnell-Taenzer* does, however, support *Hanover Shoe*'s denial of the pass-on defense for the other reasons relied upon in *Hanover Shoe:* the difficulty of proving and quantifying a pass-on, and the role of the treble-damages action as the most effective means of antitrust enforcement. 392 U. S., at 492–494.

The Court correctly discerned that the difficulty of recon-

[7] In *Darnell-Taenzer*, shippers brought suit for reparations against a railroad claiming that the railroad had charged unreasonable rates. The railroad argued that the shippers had in turn passed on to their customers any excess over the reasonable rate.

structing hypothetical pricing decisions,[8] would aggravate the already complex nature of antitrust litigation since pass-on defenses would become commonplace whenever the chain of distribution extended beyond the plaintiff. This would lessen the effectiveness of the treble-damages action, since ultimate consumers individually often suffer only minor damages and therefore have little incentive to bring suit. Limiting defendants' liability to the loss of profits suffered by direct purchasers would thus allow the antitrust offender to avoid having to pay the full social cost of his illegal conduct in many cases in which indirect purchasers failed to bring suit. Consequently,

> "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness." *Id.*, at 494.

Hanover Shoe thus confronted the Court with the choice, as had been true in *Darnell-Taenzer*, of interpreting § 4 in a way that might overcompensate the plaintiff, who had certainly suffered some injury, or of defining it in a way that underdeters the violator by allowing him to retain a portion of his ill-gotten overcharges. The Court chose to interpret § 4 so as to allow the plaintiff to recover for the entire overcharge. This choice was consistent with recognition of the importance

[8] "[T]he impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different . . . , he would have chosen a different price. . . ." 392 U. S., at 492–493. The Court further observed that it is equally difficult to ascertain "what effect a change in a company's price will have on its total sales"; and it is all but impossible to demonstrate that the particular plaintiff "could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued." *Id.*, at 493. See generally Posner, *supra*, n. 3, at 147–149.

of the treble-damages action in deterring antitrust violations.[9] But *Hanover Shoe* certainly did not imply that an indirect purchaser would not also have a cause of action under § 4 when the illegal overcharges were passed on to him.

Despite the superficial appeal of the argument that *Hanover Shoe* should be applied "consistently," thus precluding plaintiffs and defendants alike from proving that increased costs were passed along the chain of distribution, there are sound reasons for treating offensive and defensive passing-on cases differently. The interests at stake in "offensive" passing-on cases, where the indirect purchasers sue for damages for their injuries, are simply not the same as the interests at stake in the *Hanover Shoe*, or "defensive" passing-on situation. There is no danger in this case, for example, as there was in *Hanover Shoe*, that the defendant will escape liability and frustrate the objectives of the treble-damages action. Rather, the same policies of insuring the continued effectiveness of the treble-damages action and preventing wrongdoers from retaining the spoils of their misdeeds favor allowing indirect purchasers to prove that overcharges were passed on to them. *Hanover Shoe* thus can and should be limited to cases of defensive assertion of the passing-on defense to antitrust liability, where direct and indirect purchasers are not parties in the same action.[10] I fully agree with the observation:

"The attempt to transform a rejection of a defense

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[9] The pass-on defense in *Hanover Shoe* was asserted by a defendant against whom a prima facie case of liability had already been made out. The Clayton Act provides: "A final judgment . . . rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws . . . shall be prima facie evidence against such defendant . . . ." 15 U. S. C. § 16 (a). The Government had secured a judgment against United in *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (Mass. 1953), summarily aff'd, 347 U. S. 521 (1954).

[10] Commentators almost unanimously conclude that, despite *Hanover Shoe*, § 4 should be construed to authorize indirect purchasers to recover

because it unduly hampers antitrust enforcement into a reason for a complete refusal to entertain the claims of a certain class of plaintiffs seems an ingenious attempt to turn the decision [in *Hanover Shoe*] and its underlying rationale on its head." *In re Master Key Antitrust Litigation*, 1973–2 Trade Cas. ¶ 74,680, pp. 94,978–94,979 (Conn.).

II

A

Today's decision goes far to frustrate Congress' objectives in creating the treble-damages action. Treble-damages actions were first authorized under § 7 of the Sherman Act, 26 Stat. 210. The legislative history of this section shows that it was conceived primarily as a remedy for "[t]he people of the United States as individuals," especially for consumers. See, *e. g.*, 21 Cong. Rec. 1767–1768 (1890) (remarks of Sen. George); see also *id.*, at 2612 (Sens. Teller and Reagan), 2615 (Sen. Coke), 2640 (Sen. Spooner).[11] In the Clayton Act of

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upon proof that increases were passed on to them. See, *e. g.*, Comment, Standing to Sue in Antitrust Cases: The Offensive Use of Passing-on, 123 U. Pa. L. Rev. 976 (1975); Comment, *Mangano* and Ultimate-Consumer Standing: The Misuse of the *Hanover* Doctrine, 72 Colum. L. Rev. 394 (1972); Note, The Effect of Hanover Shoe on the Offensive Use of the Passing-on Doctrine, 46 So. Cal. L. Rev. 98 (1972). But see Handler & Blechman, Antitrust and the Consumer Interest: The Fallacy of *Parens Patriae* and A Suggested New Approach, 85 Yale L. J. 626, 638–655 (1976). In addition, most courts have read *Hanover Shoe* as not preventing indirect purchasers from attempting to prove that they have been injured. See, *e. g.*, *Yoder Bros., Inc.* v. *California-Florida Plant Corp.*, 537 F. 2d 1347 (CA5 1976); *In re Western Liquid Asphalt Cases*, 487 F. 2d 191 (CA9 1973), cert. denied *sub nom. Standard Oil Co. of Cal.* v. *Alaska*, 415 U. S. 919 (1974); *Illinois* v. *Bristol-Myers Co.*, 152 U. S. App. D. C. 367, 470 F. 2d 1276 (1972); *West Virginia* v. *Chas. Pfizer & Co.*, 440 F. 2d 1079 (CA2), cert. denied *sub nom. Cotler Drugs, Inc.* v. *Chas. Pfizer & Co.*, 404 U. S. 871 (1971); *In re Master Key Antitrust Litigation*, 1973–2 Trade Cas. ¶ 74,680 (Conn.).

[11] A further indication of Congress' desire to create a remedy for all

1914, Congress extended the § 7 remedy to persons injured by "any violation of the antitrust laws." See *Brunswick Corp* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 486 n. 10 (1977), citing H. R. Rep. No. 627, 63d Cong., 2d Sess., 14 (1914). These actions were conceived primarily as " 'open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered.' " [12] *Brunswick, supra*, at 486 n. 10, quoting 51 Cong. Rec. 9073 (1914) (remarks of Rep. Webb); see, *e. g.*, *id.*, at 9079 (Rep. Volstead), 9270 (Rep. Carlin), 9414–9417, 9466–9467, 9487–9495. See also the House debates following the conference committee report. *Id.*, at 16274–16275 (Rep. Webb), 16317–16319 (Rep. Floyd).

The Court has interpreted § 4 broadly, this in recognition of the plainly stated congressional objective, *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 4 (1958), that the private treble-damages action play a paramount role in the enforcement of the fundamental economic policy of the Nation, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 130–131 (1969); *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U. S. 311, 318 (1965), and has concluded that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 139 (1968). The federal courts have accordingly been cautioned "not [to]

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persons, including consumers, even though their individual injuries might be comparatively slight, was the elimination of the jurisdictional-amount requirement for antitrust actions. See 21 Cong. Rec. 2612, 3148–3149 (1890) (remarks of Sens. Sherman and Edmunds).

[12] The fact that damages are trebled both aids deterrence and provides the incentive of compensation, since it encourages suits for relatively minor injuries.

add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws," *Radovich* v. *National Football League*, 352 U. S. 445, 454 (1957), and express approval has been given the " 'tendency of the courts . . . to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights." *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 265–266 (1946). See also *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, *supra*, at 130–131; *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, *supra*; *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S., at 494. And *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656, 660 (1961), emphasized that to plead a cause of action under § 4 "allegations adequate to show a violation and . . . that plaintiff was damaged thereby are all the law requires."

B

The recently enacted Hart-Scott-Rodino Antitrust Improvements Act of 1976 was expressly adopted to create "an effective mechanism to permit consumers to recover damages for conduct which is prohibited by the Sherman Act, by giving State attorneys general a cause of action [to sue as *parens patriae* on behalf of the States' citizens] against antitrust violators." S. Rep. No. 94–803, p. 6 (1976). Title III of the new Act responded to the holding of *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U. S. 251 (1972), that the Clayton Act does not authorize a State to sue for damages for an injury to its general economy allegedly attributable to a violation of the antitrust laws. The Senate Report accompanying the new Act expressly found that "[t]he economic burden of most antitrust violations is borne by the consumer in the form of higher prices for goods and services," S. Rep. No. 94–803, *supra*, at 39, and it is clear that the new Act is intended to provide a remedy

for injured consumers whether or not they purchased directly from the violator. The Senate Report states, *id.*, at 42:

> "A direct cause of action is granted the States to avoid the inequities and inconsistencies of restrictive judicial interpretations. . . . Section 4C is intended to assure that consumers are not precluded from the opportunity of proving the amount of their damage and to avoid problems with respect to manageability [of class actions], *standing, privity, target area, remoteness, and the like.*" [13] (Emphasis supplied.)

Representative Rodino, a sponsor, stated during the House debates:

> "[A]ssuming the State attorney general proves a violation, and proves that an overcharge was 'passed on' to the consumers, injuring them 'in their property'; that is, their pocketbooks—recoveries are authorized by the compromise bill whether or not the consumers purchased directly from the price fixer, or indirectly, from intermediaries, retailers, or middlemen. The technical and procedural argument that consumers have no 'standing' whenever they are not 'in privity' with the price fixer, and have not purchased directly from him, is rejected by the compromise bill. Opinions relying on this procedural

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[13] Congress rejected earlier Court of Appeals and District Court decisions erecting standing barriers to suits by indirect purchasers and chose instead to pattern the Act "after such innovative decisions as *In re Western Liquid Asphalt Cases*, 487 F. 2d 191 (9th Cir. 1973); *In re Master Key Litigation*, 1973 Trade Cases ¶ 74,680 and 1975 Trade Cases ¶ 60,377 (DC Conn.); *State of Illinois* v. *Ampress Brick Co.*, 1975 Trade Cases ¶ 60,295 (DC Ill.) [this case below]; *Carnivale Bag Co.* v. *Slide Rite Mfg.*, 1975 Trade Cases ¶ 60,370 (S. D. N. Y.); *In re Antibiotics Antitrust Actions*, 333 F. Supp. 278 (S. D. N. Y. 1971); and *West Virginia* v. *Charles Pfizer & Co.*, 440 F. 2d 1079 (2d Cir. 1971)." Congress accepted these decisions as correctly stating the law. S. Rep. No. 94–803, pp. 42–43 (1976).

technicality . . . are squarely rejected by the compromise bill." 122 Cong. Rec. H10295 (daily ed. Sept. 16, 1976).

It is difficult to see how Congress could have expressed itself more clearly. Even if the question whether indirect purchasers could recover for damages passed on to them was open before passage of the 1976 Act, and I do not believe that it was, Congress' interpretation of § 4 in enacting the *parens patriae* provision should resolve it in favor of their authority to sue. Indeed, the House Report accompanying the bill actually referred to the opinion of the District Court in this case as an example of the correct answer. N. 13, *supra*. The Court's tortuous efforts to impose a "consistency" upon this area of the law that Congress has so clearly rejected is a return to the "legal somersaults and twistings and turnings" of the Court's earlier opinions that ultimately led to the passage of the Clayton Act in 1914 to salvage the ailing Sherman Act. See 51 Cong. Rec. 9086 (1914) (remarks of Rep. Kelly).

III

Hanover Shoe correctly observed that the necessity of tracing a cost increase through several levels of a chain of distribution "would often require additional long and complicated proceedings involving massive evidence and complicated theories." 392 U. S., at 493. But this may be said of almost all antitrust cases. *Hanover Shoe* itself highlights this unavoidable complication, in that it requires the plaintiff to prove a probable course of events which *would have occurred* but for the violation.[14] In essence, estimating the amount of

[14] In *Hanover Shoe*, the measure of damages was the difference between the amount Hanover paid for the lease and the amount it *would have paid* had United agreed to sell the machinery. It has been suggested that the burden of demonstrating a pass-on may be no more difficult or speculative than the plaintiff's initial task of proving an overcharge in the first instance. See Pollock, Automatic Treble Damages and the Passing-on Defense: The Hanover Shoe Decision, 13 Antitrust Bull. 1183, 1210 (1968).

damages passed on to an indirect purchaser is no different from and no more complicated than estimating what the middleman's selling price would have been, absent the violation. See *ante*, at 733 n. 13.

Nor should the fact that the price-fixed product in this case (the concrete block) was combined with another product (the buildings) before resale operate as an absolute bar to recovery. It may well be true, as the State claims, that the cost of the block was included separately in the project bids and therefore can be factored out from the price of the building with relative certainty. In any case, this is a factual matter to be determined based on the strength of the plaintiff's evidence.[15] See, *e. g.*, *In re Western Liquid Asphalt Cases*, 487 F. 2d 191 (CA9 1973), cert. denied *sub nom. Standard Oil Co. of Cal.* v. *Alaska*, 415 U. S. 919 (1974). Admittedly, there will be many cases in which the plaintiff will be unable to prove that the overcharge was passed on. In others, the portion of the overcharge passed on may be only approximately determinable. But again, this problem hardly distinguishes this case from other antitrust cases. Reasoned estimation is required in all antitrust cases, but "while the damages [in such cases] may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 563 (1931). See also *Bigelow* v. *RKO Radio Pictures*, 327 U. S., at 266; *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 379 (1927). Lack of precision in apportioning damages between direct and indirect purchasers is thus plainly not a convincing reason for denying

[15] One commentator has suggested that, in deciding whether to permit recovery by indirect purchasers in a particular case, courts should consider the number of intervening hands the product has passed through and the extent of its change in the process. P. Areeda, Antitrust Analysis: Problems, Text, Cases 75 (2d ed. 1974).

indirect purchasers an opportunity to prove their injuries and damages. Moreover, from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as someone redresses the violation. Antitrust violators are equally deterred whether the judgments against them are in favor of direct or indirect purchasers. *Hanover Shoe* said as much. The Court's decision recognized that some plaintiffs would recover more than their due, but concluded that the necessity of assuring that *someone* recover and thus deter future violations and prevent the antitrust offender from profiting by his illegal overcharge outweighed any resulting injustice.[16]

I concede that despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable. See, *e. g.*, *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977); *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U. S. 251 (1972). Courts have therefore developed various tests of antitrust "standing," not unlike the concept of proximate cause in tort law, to define that point. The definition has been variously articulated, usually in terms of two tests. The more restrictive test focuses on the directness of the injury;[17] the more liberal, and more widely accepted, on whether the plaintiff is within the "target area" of the defendant's violation.[18]

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[16] This holding is consistent with the Court's continuing concern for the effectiveness of the treble-damages action, which has been sustained even when the plaintiff was "no less morally reprehensible than the defendant" with whom he had conspired. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 139 (1968).

[17] See, *e. g.*, *Loeb* v. *Eastman Kodak Co.*, 183 F. 704 (CA3 1910).

[18] Earlier this Term, *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, disallowed a treble-damages recovery, stating that in order to recover antitrust plaintiffs must prove "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the] defendants' acts unlawful." 429 U. S., at 489. At least one Court of Appeals has rephrased the target-area test in terms of whether the injury to the plaintiff is a reasonably foreseeable consequence of the defendant's illegal conduct. *Mulvey* v. *Samuel Goldwyn Productions*, 433 F. 2d 1073 (CA9 1970), cert. denied, 402 U. S. 923 (1971).

But if the broad language of § 4 means anything, surely it must render the defendant liable to those within the defendant's chain of distribution. It would indeed be "paradoxical to deny recover to the ultimate consumer while permitting the middlemen a windfall recovery." P. Areeda, Antitrust Analysis: Problems, Text, Cases 75 (2d ed. 1974).

IV

I acknowledge some abstract merit in the argument that to allow indirect purchasers to sue, while, at the same time, precluding defendants from asserting pass-on defenses in suits by direct purchasers, subjects antitrust defendants to the risk of multiple liability. But as a practical matter, existing procedural mechanisms can eliminate this danger in most instances. Even though, as the Court says, no procedure currently exists which can eliminate the possibility entirely, *ante*, at 731 n. 11, the hypothetical possibility that a few defendants might be subjected to the danger of multiple liability does not, in my view, justify erecting a bar against all recoveries by indirect purchasers without regard to whether the particular case presents a significant danger of double recovery. The "double recovery" specter was argued in the Congress that passed the Hart-Scott-Rodino Act, and was rejected. The Senate Report recorded the Act's purpose to codify the holding of the Court of Appeals for the Ninth Circuit in *In re Western Liquid Asphalt Cases, supra:*

> " 'We therefore see no problem of double recovery, and we believe that if this difficulty should arise in some other connection, the district court will be able to fashion relief accordingly. In addition to the court's control over its decree, numerous devices exist. We note that the consolidation of cases, which has already occurred, is one means of averting duplicitous awards. The short, four-year statute of limitations is another; later suits, after

final judgment herein, are unlikely. 15 U. S. C. § 15b. In other cases, it may be that statutory interpleader, 28 U. S. C. § 1335, could be used by antitrust defendants to avoid double liability. If necessary, special masters may be appointed to handle complex cases. Finally, there are the doctrines of res judicata and collateral estoppel and procedures for compulsory joinder. The day is long past when courts, particularly federal courts, will deny relief to a deserving plaintiff merely because of procedural difficulties or problems of apportioning damages.'

"We would prefer to place the burden of proving apportionment upon appellees, rather than deny all recovery to appellants. Such a burden would be the consequence of appellees' illegal acts, not appellants' suits. Where the choice is between a windfall to intermediaries or letting guilty defendants go free, liability is imposed. *Hanover Shoe, supra,* 392 U. S. at 494. So, too, between ultimate purchasers and defendants." S. Rep. No. 94–803, p. 44 (1976), quoting 487 F. 2d, at 201 (citation omitted).

Moreover, the possibility of multiple recovery arises in only two situations: (1) where suits by direct and indirect purchasers are pending at the same time but in different courts; and (2) where additional suits are filed after an award of damages based on the same violation in a prior suit.[19] In the first situation, the United States, Brief as *Amicus Curiae* 25, cogently points out that district courts may make use of the alternatives suggested by the Manual for Complex Litigation, 1 (pt. 2) J. Moore, Federal Practice (1976): district courts may use the intradistrict transfer power created by 28 U. S. C. § 1404 (b), coordinate pretrial proceedings of cases pending in

[19] If direct and indirect purchasers bring suit in the same court, the cases may be consolidated and damages allocated in accordance with Fed. Rule Civ. Proc. 42 (a). See *West Virginia* v. *Chas. Pfizer & Co.*, 440 F. 2d 1079 (CA2 1971).

different districts, or transfer cases to a single district pursuant to § 1404 (a). In addition, the Judicial Panel on Multidistrict Litigation is empowered by 28 U. S. C. § 1407 to transfer cases involving common questions of fact to any district for coordinated pretrial proceedings upon its determination that the transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." After pretrial transfers under this section, cases can be consolidated and transferred to the same district for trial pursuant to the transfer power under § 1404 (a).[20] A further device mentioned in *Western Liquid Asphalt* is statutory interpleader under 28 U. S. C. § 1335, by which the defendant can bring all potential plaintiffs into the same court and require them to litigate *inter se* to determine their appropriate shares of the total recovery.[21]

True, there is a greater hypothetical danger of multiple recovery where suits are independently instituted after an earlier suit based on the same violation has proceeded to judgment.[22] But even here the likelihood that defendants

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[20] For a discussion of this process, see Note, The Judicial Panel and the Conduct of Multidistrict Litigation, 87 Harv. L. Rev. 1001 (1974); Comment, The Experience of Transferee Courts Under the Multidistrict Litigation Act, 39 U. Chi. L. Rev. 588 (1972).

[21] Petitioners suggest that interpleader may be an impractical alternative for some defendants, since it requires a defendant to complicate the suit by bringing in ultimate consumers and to post bond for the amount in controversy. See 28 U. S. C. § 1335 (a)(2). Although § 1335 clearly places a burden upon defendants who elect to use it in order to avoid potential multiple liability, that burden is not unique to antitrust cases, and Congress has clearly indicated that it considers the burden justified. See S. Rep. No. 94–803, p. 44 (1976).

[22] The problem of potential multiple recoveries is not present in this case. All suits against petitioners were filed in the Northern District of Illinois. Petitioners never sought consolidation under Fed. Rule Civ. Proc. 42 (a) and stipulated in settlements with direct purchasers that the settlement would not affect the rights of indirect purchasers.

will be subjected to multiple liability is, as a practical matter, remote. The extended nature of antitrust actions, often involving years of discovery, combines with the short four-year statute of limitations to make it impractical for potential plaintiffs to sit on their rights until after entry of judgment in the earlier suit.

The Court today regrettably weakens the effectiveness of the private treble-damages action as a deterrent to antitrust violations by, in most cases, precluding consumers from recovering for antitrust injuries. For in many instances, consumers, although indirect purchasers, bear the brunt of antitrust violations. To deny them an opportunity for recovery is particularly indefensible when direct purchasers, acting as middlemen, and ordinarily reluctant to sue their suppliers,[23] pass on the bulk of their increased costs to consumers farther along the chain of distribution. Congress has given us a clear signal that § 4 is not to be read to have the restrictive

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[23] The opinion for the Court "recognize[s] that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers," but concludes that "on balance, and until there are clear directions from Congress to the contrary, we conclude that the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it." *Ante*, at 746. But the intent of Congress in enacting the *parens patriae* provision of the 1976 Act was clearly to provide a mechanism to permit recovery by consumers, and this purpose is not furthered by a rule that will keep most consumers out of court.

The Court's opinion further observes that "[m]any of the indirect purchasers barred from asserting pass-on claims . . . have such a small stake in the lawsuit that even if they were to recover as part of a class, only a small fraction would be likely to come forward to collect their damages." *Ante*, at 747. Yet it was precisely because of judicially perceived weaknesses in the class action as a device for consumer recovery for antitrust violations that Congress enacted the *parens patriae* provision of the 1976 Act.

scope ascribed to it by the Court today. I would follow the congressional understanding and therefore would affirm.[24]

MR. JUSTICE BLACKMUN, dissenting.

I regard MR. JUSTICE BRENNAN's dissenting opinion as persuasive and convincing, and I join it without hesitation.

I add these few sentences only to say that I think the plaintiffs-respondents in this case, which they now have lost, are the victims of an unhappy chronology. If *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968), had not preceded this case, and were it not "on the books," I am positive that the Court today would be affirming, perhaps unanimously, the judgment of the Court of Appeals. The policy behind the Antitrust Acts and all the signs point in that direction, and a conclusion in favor of indirect purchasers who could demonstrate injury would almost be compelled.

But *Hanover Shoe* is on the books, and the Court feels that it must be "consistent" in its application of pass-on. That,

[24] Abundant authority sanctions deference to congressional indications in subsequent legislation regarding the congressional meaning in earlier Acts worded consistently with that meaning. *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380 (1969); *FHA* v. *The Darlington, Inc.*, 358 U. S. 84, 90 (1958); *United States* v. *Stafoff*, 260 U. S. 477, 480 (1923); *New York & Norfolk R. Co.* v. *Peninsula Exchange*, 240 U. S. 34, 39 (1916). Although it is true, as the Court's opinion states, *ante*, at 734 n. 14, that the post-enactment statements of "particular legislators" who participated in the enactment of a statute cannot change its meaning, see *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 132 (1974), quoting *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U. S. 612, 639 n. 34 (1967), in this case, the House and Senate Reports accompanying the amendments to § 4 of the Clayton Act clearly reveal the 94th Congress' interpretation of that section as permitting the kind of consumer action which the Court now prohibits. Moreover, it is no answer to this to say that the new *parens patriae* provision will not in all cases directly compensate indirect purchasers, *ante*, at 747 n. 31, for it is clear that despite the difficulty of distributing benefits to such injured persons the new Act authorizes recovery by the State on their behalf.

for me, is a wooden approach, and it is entirely inadequate when considered in the light of the objectives of the Sherman and Clayton Acts. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 tells us all that is needed as to Congress' present understanding of the Acts. Nevertheless, we must now await still another statute which, as the Court acknowledges, *ante*, at 734 n. 14, the Congress may adopt. One regrets that it takes so long and so much repetitious effort to achieve, and have this Court recognize, the obvious congressional aim.

Syllabus

WARD *v.* ILLINOIS

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 76–415. Argued April 27, 1977—Decided June 9, 1977

Prior to the decision in *Miller* v. *California*, 413 U. S. 15, appellant was convicted of selling obscene sado-masochistic materials in violation of the Illinois obscenity statute forbidding the sale of obscene matter and providing that "[a] thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." The conviction was affirmed after *Miller*, the Illinois Supreme Court rejecting appellant's challenge to the constitutionality of the statute for failure to conform to *Miller* standards, as well as his claim that the publications in question were not obscene. *Held:*

1. The Illinois statute is not unconstitutionally vague as failing to give appellant notice that materials dealing with the kind of sexual conduct involved here could not be legally sold in the State, where (whether or not the State has complied with *Miller*'s requirement that the sexual conduct that may not be depicted must be specifically defined by applicable state law as written or authoritatively construed) appellant had ample guidance from a previous decision of the Illinois Supreme Court making it clear that his conduct did not conform to Illinois law. Pp. 771–773.

2. Sado-masochistic materials are the kind of materials that may be proscribed by state law, *Mishkin* v. *New York*, 383 U. S. 502, even though they were not expressly included within the examples of the kinds of sexually explicit representations that *Miller* used to explicate the aspect of its obscenity definition dealing with patently offensive depictions of specifically defined sexual conduct. P. 773.

3. The materials in question were properly found by the courts below to be obscene under the Illinois statute, which conforms to the *Miller* standards, except that it retains the stricter "redeeming social value" obscenity criterion announced in *Memoirs* v. *Massachusetts*, 383 U. S. 413. P. 773.

4. The Illinois statute is not unconstitutionally overbroad for failure to state specifically the kinds of sexual conduct the description or representation of which the State intends to proscribe, where it appears that in prior decisions the Illinois Supreme Court, although not expressly

describing the kinds of sexual conduct intended to be referred to under the *Miller* guideline requiring inquiry "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," expressly incorporated such guideline as part of the law and thereby intended as well to adopt the *Miller* explanatory examples, which gave substantive meaning to such guideline by indicating the kinds of materials within its reach. Pp. 773–776.

63 Ill. 2d 437, 349 N. E. 2d 47, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which STEWART, J., joined, *post*, p. 777. STEVENS, J., filed a dissenting opinion, in which BRENNAN, STEWART, and MARSHALL, JJ., joined, *post*, p. 777.

J. Steven Beckett argued the cause for appellant. With him on the brief was *Donald M. Reno, Jr.*

Melbourne A. Noel, Jr., Assistant Attorney General of Illinois, argued the cause for appellee. With him on the brief were *William J. Scott*, Attorney General, and *Raymond McKoski*, Assistant Attorney General.

MR. JUSTICE WHITE delivered the opinion of the Court.

The principal issue in this case is the validity of the Illinois obscenity statute, considered in light of *Miller* v. *California*, 413 U. S. 15 (1973). There we reaffirmed numerous prior decisions declaring that "obscene material is unprotected by the First Amendment," *id.*, at 23; but acknowledging "the inherent dangers of undertaking to regulate any form of expression," *ibid.*, we recognized that official regulation must be limited to "works which depict or describe sexual conduct" and that such conduct "must be specifically defined by the applicable state law, as written or authoritatively construed." *Id.*, at 24. Basic guidelines for the trier of fact, along with more specific suggestions, were then offered:

"The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary

community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois* v. *Wisconsin*, [408 U. S. 229,] 230 [(1972)], quoting *Roth* v. *United States*, [354 U. S. 476,] 489 [(1957)]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the *'utterly* without redeeming social value' test of *Memoirs* v. *Massachusetts*, 383 U. S., at 419; that concept has never commanded the adherence of more than three Justices at one time. See *supra*, at 21. If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. See *Kois* v. *Wisconsin*, *supra*, at 232; *Memoirs* v. *Massachusetts*, *supra*, at 459–460 (Harlan, J., dissenting); *Jacobellis* v. *Ohio*, 378 U. S., at 204 (Harlan, J., dissenting); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 284–285 (1964); *Roth* v. *United States*, *supra*, at 497–498 (Harlan, J., concurring and dissenting).

"We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra:*

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions

of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.*, at 24–25. (Footnotes omitted.)

Illinois Rev. Stat., c. 38, § 11–20 (a)(1) (1975), forbids the sale of obscene matter. Section 11–20 (b) defines "obscene" as follows:

> "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs." [1]

In October 1971 appellant Ward was charged in the State of Illinois with having sold two obscene publications in violation of § 11–20 (a)(1). A jury was waived. At the bench trial the State's evidence consisted solely of the two publications—"Bizarre World" and "Illustrated Case Histories, a Study of Sado-Masochism"—and the testimony of the police officer who purchased them in Ward's store. Ward was found guilty, and in April 1972, he was sentenced to one day in jail and fined $200. His conviction was affirmed in the state appellate courts after this Court's decision in *Miller*. The Illinois Supreme Court expressly rejected his challenge to the constitutionality of the Illinois obscenity statute for failure to conform to the standards of *Miller*, as well as a claim that the two publications were not obscene. 63 Ill. 2d 437, 349 N. E. 2d 47 (1976). Ward appealed, and we noted probable jurisdiction, 429 U. S. 1037 (1977), to resolve a conflict with a

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[1] Section 11–20 (c) provides:

"(c) Interpretation of Evidence.

"Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience."

decision of a three-judge District Court for the Northern District of Illinois. *Eagle Books, Inc.* v. *Reinhard*, 418 F. Supp. 345 (1976), appeal docketed, No. 76-366. We affirm.

As we read the questions presented by Ward,[2] they fairly subsume four issues. First, is the claim that Illinois has failed to comply with *Miller*'s requirement that the sexual conduct that may not be depicted in a patently offensive way must be "specifically defined by the applicable state law as written or authoritatively construed," see *supra*, at 768, and that absent such compliance the Illinois law is unconstitutionally vague because it failed to give him notice that materials dealing with the kind of sexual conduct involved here could not legally be sold in the State. This claim is wholly without merit. As we shall see below, the State has complied with *Miller*, but even if this were not the case, appellant had ample guidance from the Illinois Supreme Court that his conduct did not conform to the Illinois law. Materials such as these, which by title or content may fairly be described as sado-masochistic, had been expressly held to violate the Illinois statute long before *Miller* and prior to the sales for which Ward was prosecuted.

In *People* v. *Sikora*, 32 Ill. 2d 260, 267–268, 204 N. E. 2d 768, 772–773 (1965), there are detailed recitations of the kind of sexual conduct depicted in the materials found to be obscene under the Illinois statute. These recitations included "sadism and masochism."[3] See also *People* v. *DeVilbiss*, 41

[2] The questions presented in Ward's Jurisdictional Statement 3 are (1) whether the provisions of § 11-20, "on its face and as construed by the Illinois Supreme Court, are vague, indefinite, overbroad and uncertain, in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments to the Constitution of the United States"; and (2) whether "the publications, 'Bizarre World' and 'Illustrated Case Histories, a Study of Sado-Masochism' are constitutionally protected, as a matter of law."

[3] The Illinois Supreme Court described the materials as follows, 32 Ill. 2d, at 267–268, 204 N. E. 2d, at 772–773:

" 'Lust Campus' by Andrew Shaw is a story of sexual adventures on a

Ill. 2d 135, 142, 242 N. E. 2d 761, 765 (1968);[4] cf. *Chicago* v. *Geraci*, 46 Ill. 2d 576, 582–583, 264 N. E. 2d 153, 157 (1970).[5] The construction of the statute in *Sikora* gives detailed meaning to the Illinois law, is binding on us, and makes plain that § 11–20 reaches the kind of sexual materials which we now

college campus 'where even members of the faculty taught sin and evil.' The book describes homosexuals 'necking' on a public beach; mutual masturbation; self-fondling; a circle of persons engaged in oral-genital contact; rape; intercourse; lesbian intercourse; cunnilingus and flagellation; flagellation with barbed wire; an abortion with red-hot barbed wire; masturbation with a mirror reflection, and a transvestite episode.

" 'Passion Bride' by John Dexter described curricular and extracurricular sexual episodes that take place during a honeymoon on the French Riviera. The book describes masturbation; intercourse; a party between an old man and three prostitutes; attempted intercourse in a bath; lesbian foreplay; flagellation; rape ending in the death of the female from a broken back and intercourse ending in the broken back of the male participant.

" 'Crossroads of Lust' by Andrew Shaw describes the sexual adventures of various persons in a small town. There are numerous descriptions of intercourse; lesbian intercourse; oral-genital contact; and rape. A woman stabs a man in the course of intercourse, completing the act after he is dead. There are also three voyeurism scenes, two of which involve watching lesbian love play. The third is characterized by sadism and masochism."

[4] This case involved a local ordinance that the Illinois Supreme Court described as identical to the state statute. The court described the materials at issue:

"The books are replete with accounts of homosexual acts, masturbation, flagellation, oral-genital acts, rape, voyeurism, masochism and sadism. These accounts can only appeal to the prurient interest, and clearly go beyond customary limits of candor in the kinds of conduct described and in the detail of description." 41 Ill. 2d, at 142, 242 N. E. 2d, at 765.

[5] The materials under scrutiny—also under a local ordinance—were described by the court:

"The author's accounts of normal and abnormal sexual conduct, including sodomy, flagellation, masturbation, oral-genital contact, anal intercourse, lesbianism, and sadism and masochism, are vivid, intimately detailed, and explicit. (*Cf. One, Inc.* v. *Olesen* (1958), 355 U. S. 371 . . .)" 46 Ill. 2d, at 582–583, 264 N. E. 2d, at 157.

have before us. If Ward cannot be convicted for selling these materials, it is for other reasons and not because the Illinois statute is vague and gave him no notice that the statute purports to ban the kind of materials he sold. The statute is not vague as applied to Ward's conduct.

Second, Ward appears to assert that sado-masochistic materials may not be constitutionally proscribed because they are not expressly included within the examples of the kinds of sexually explicit representations that *Miller* used to explicate the aspect of its obscenity definition dealing with patently offensive depictions of specifically defined sexual conduct. But those specifics were offered merely as "examples," 413 U. S., at 25; and, as later pointed out in *Hamling* v. *United States*, 418 U. S. 87, 114 (1974), they "were not intended to be exhaustive." Furthermore, there was no suggestion in *Miller* that we intended to extend constitutional protection to the kind of flagellatory materials that were among those held obscene in *Mishkin* v. *New York*, 383 U. S. 502, 505–510 (1966). If the *Mishkin* publications remain unprotected, surely those before us today deal with a category of sexual conduct which, if obscenely described, may be proscribed by state law.

The third claim is simply that these materials are not obscene when examined under the three-part test of *Miller*. This argument is also foreclosed by *Mishkin* v. *New York*, *supra*, which came down the same day as *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966), and which employed the obscenity criteria announced by the latter case. See *Marks* v. *United States*, 430 U. S. 188, 194 (1977). The courts below examined the materials and found them obscene under the Illinois statute, which, as we shall see, *infra*, at 774–776, conforms to the standards set out in *Miller*, except that it retains the stricter *Memoirs* formulation of the "redeeming social value" factor. We have found no reason to differ with the Illinois courts.

Fourth, even assuming that the Illinois statute had been

construed to overcome the vagueness challenge in this case and even assuming that the materials at issue here are not protected under *Miller*, there remains the claim that Illinois has failed to conform to the *Miller* requirement that a state obscenity law, as written or authoritatively construed, must state specifically the kinds of sexual conduct the description or representation of which the State intends to proscribe by its obscenity law. If Illinois has not complied with this requirement, its statute is arguably overbroad, unconstitutional on its face, and an invalid predicate for Ward's conviction.

As we see it, Illinois has not failed to comply with *Miller*, and its statute is not overbroad. *People* v. *Ridens*, 51 Ill. 2d 410, 282 N. E. 2d 691 (1972), vacated and remanded, 413 U. S. 912 (1973), involved a conviction under this same Illinois obscenity law. It was pending on our docket when our judgment and opinion in *Miller* issued. We vacated the *Ridens* judgment and remanded the case for further consideration in the light of *Miller*. On remand, the Illinois Supreme Court explained that originally § 11–20 had provided the tests for obscenity found in *Roth* v. *United States*, 354 U. S. 476 (1957), and that it subsequently had been construed to incorporate the tripartite standard found in *Memoirs* v. *Massachusetts*, *supra*, including the requirement that the materials prohibited be "utterly without redeeming social value." *People* v. *Ridens*, 59 Ill. 2d 362, 321 N. E. 2d 264 (1974). The Illinois court then proceeded to "construe section 11–20 of the Criminal Code . . . to incorporate parts (a) and (b) of the *Miller* standards," *id.*, at 373, 321 N. E. 2d, at 270, but to retain the "utterly without redeeming social value" standard of *Memoirs* in preference to the more relaxed criterion contained in part (c) of the *Miller* guidelines. Ridens' conviction was affirmed, and we denied certiorari.[6] 421 U. S. 993 (1975).

[6] Four Justices dissented, but waived the Rule of Four—that, if at least

Because the Illinois court did not go further and expressly describe the kinds of sexual conduct intended to be referred to under part (b) of the *Miller* guidelines, the issue is whether the Illinois obscenity law is open-ended and overbroad. As we understand the Illinois Supreme Court, however, the statute is not vulnerable in this respect. That court expressly incorporated into the statute part (b) of the guidelines, which requires inquiry "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." 413 U. S., at 24. The Illinois court thus must have been aware of the need for specificity and of the *Miller* Court's examples explaining the reach of part (b). See *id.*, at 25. The Illinois court plainly intended to conform the Illinois law to part (b) of *Miller*, and there is no reason to doubt that, in incorporating the guideline as part of the law, the Illinois court intended as well to adopt the *Miller* examples, which gave substantive meaning to part (b) by indicating the kinds of materials within its reach. The alternative reading of the decision would lead us to the untenable conclusion that the Illinois Supreme Court chose to create a fatal flaw in its statute by refusing to take cognizance of the specificity requirement set down in *Miller*.

Furthermore, in a later case, *People* v. *Gould*, 60 Ill. 2d 159, 324 N. E. 2d 412 (1975), the Illinois Supreme Court quoted at length from *Miller* v. *California*, including the entire passage set out at the beginning of this opinion, *supra*, at 768–770—a passage that contains the explanatory examples as well as the guidelines. It then stated that *Ridens* had construed the Illinois statute to include parts (a) and (b) of the *Miller* guidelines, and it expressly referred to the standards set out in the immediately preceding quotation from *Miller*. 60 Ill. 2d, at 164–165, 324 N. E. 2d, at 415. Because the quotation contained not only part (b) but the examples given to

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four Justices so request, the Court will give plenary consideration to a particular case. 421 U. S., at 994 n.

explain that part, it would be a needlessly technical and wholly unwarranted reading of the Illinois opinions to conclude that the state court did not adopt these explanatory examples as well as the guidelines themselves.

It might be argued that, whether or not the Illinois court adopted the *Miller* examples as part of its law, § 11–20 nevertheless remains overbroad because the State has not provided an exhaustive list of the sexual conduct the patently offensive description of which may be held obscene under the statute. We agree with the Illinois Supreme Court, however, that "in order that a statute be held overbroad the overbreadth 'must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' (*Broadrick* v. *Oklahoma*, 413 U. S. 601, 615 . . . .)" *People* v. *Ridens*, *supra*, at 372, 321 N. E. 2d, at 269. Since it is plain enough from its prior cases and from its response to *Miller* that the Illinois court recognizes the limitations on the *kinds* of sexual conduct which may not be represented or depicted under the obscenity laws, we cannot hold the Illinois statute to be unconstitutionally overbroad.

Given that Illinois has adopted *Miller*'s explanatory examples, what the State has done in attempting to bring its statute in conformity with *Miller* is surely as much as this Court did in its post-*Miller* construction of federal obscenity statutes. In *Hamling* v. *United States*, 418 U. S., at 114, we construed 18 U. S. C. § 1461, which prohibits the mailing of obscene matter, to be limited to "the sort of" patently offensive representations or descriptions of that specific hardcore sexual conduct given as examples in *Miller*. We have also indicated our approval of an identical approach with respect to the companion provisions of 18 U. S. C. § 1462, which prohibits importation or transportation of obscene matter. See *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123, 130 n. 7 (1973).

Finding all four of Ward's claims to be without merit, we affirm the judgment of the Illinois Supreme Court.

So ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART joins, dissenting.

Petitioner was convicted of selling allegedly obscene publications in violation of the Illinois Obscenity Statute, Ill. Rev. Stat., c. 38, § 11–20 (a)(1) (1975). The Illinois Supreme Court affirmed the conviction. Although I have joined my Brother STEVENS' dissent, I could also reverse the conviction on the ground I have previously relied upon, namely that this statute is "clearly overbroad and unconstitutional on its face." 413 U. S. 913, 914 (1973) (BRENNAN, J., dissenting in *Miller* v. *United States* and other cases), citing *Miller* v. *California*, 413 U. S. 15, 47 (1973) (BRENNAN, J., dissenting); see *Ridens* v. *Illinois*, 413 U. S. 912 (1973), vacating and remanding 51 Ill. 2d 410, 282 N. E. 2d 691 (1972).

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join, dissenting.

The decision in this case confirms the statement in *Miller* v. *California*, 413 U. S. 15, 23, that "[t]his is an area in which there are few eternal verities." Today, the Court silently abandons one of the cornerstones of the *Miller* test announced so forcefully just five years ago.

The *Miller* Court stated:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that

his public and commercial activities may bring prosecution." *Id.*, at 27.

The specificity requirement is stressed elsewhere in the opinion.[1] More than 50 cases were remanded for further consideration to give the defendants the "benefit" of this aspect of *Miller*. See 413 U. S. 902 *et seq.*; *Marks* v. *United States*, 430 U. S. 188, 197 n. 12.

Many state courts, taking *Miller* at face value, invalidated or substantially limited their obscenity laws.[2] Others, like Illinois, did "little more than pay lip service to the specificity requirement in *Miller*." F. Schauer, The Law of Obscenity 167 (1976). Like most pre-*Miller* obscenity statutes, the Illinois statute contained open-ended terms broad enough to prohibit the distribution of any material making an "appeal . . . to prurient interest."[3] In its post-*Miller* opinions,

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[1] "That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. . . .

"The basic guidelines for the trier of fact must be: . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law . . . ." 413 U. S., at 24.

On the following page, the Court gives examples of such "specific" definitions.

[2] *E. g.*, *State* v. *Harding*, 114 N. H. 335, 321 A. 2d 108 (1974); *People* v. *Tabron*, 320 Colo. 646, 544 P. 2d 372 (1976); *ABC Interstate Theatres, Inc.* v. *State*, 325 So. 2d 123 (Miss. 1976); *State* v. *Wedelstedt*, 213 N. W. 2d 652 (Iowa 1973); *Commonwealth* v. *Horton*, 365 Mass. 164, 310 N. E. 2d 316 (1974). Many statutes passed since *Miller* have included definitions more specific than that given in *Miller*. See, *e. g.*, La Rev. Stat. Ann. § 14:106 (1974); N. Y. Penal Law § 235.00 (McKinney 1974 and Supp. 1976).

[3] This Court saved such a statute in *Hamling* v. *United States*, 418 U. S. 87, by holding that it was limited to the examples given in *Miller*. In its final footnote to *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123, 130 n. 7, the Court had stated that it was prepared to construe generic words such as "obscene" and "lewd" in 18 U. S. C. § 1462, "as limiting regulated material to patently offensive representations or descriptions of that *specific* 'hard core' sexual conduct given as examples in

the Illinois Supreme Court has made it clear that the statute covers all of the *Miller* examples. It has not, however, stated that the statute is limited to those examples, or to any other specifically defined category.[4]

Miller." (Emphasis added.) In *Hamling*, the Court quoted this language and added:

"As noted above, we indicated in [*12 200-Ft. Reels of Film*] that we were prepared to construe the generic terms in 18 U. S. C. § 1462 to be limited to the sort of 'patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller* v. *California*.' We now so construe the companion provision in 18 U. S. C. § 1461 . . . ." 418 U. S., at 114.

[4] In a well-reasoned opinion, a three-Judge District Court for the Northern District of Illinois carefully reviewed the Illinois authorities and concluded that Illinois has failed to meet the specificity requirement of *Miller*. *Eagle Books, Inc.* v. *Reinhard*, 418 F. Supp. 345 (ND Ill. 1976). This conclusion is well founded.

The Illinois statute defines obscenity in these terms:

"A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." Ill. Rev. Stat., c. 38, § 11–20 (b) (1975).

Nothing in this definition or the rest of the statute "specifically defines" what depiction of hard-core sexual conduct is prohibited.

The Illinois Supreme Court has not remedied this deficiency by supplying a limiting construction. In its primary discussion of the State's obscenity statute in relation to the *Miller* specificity requirement, *People* v. *Ridens*, 59 Ill. 2d 362, 321 N. E. 2d 264 (1974) (*Ridens II*), the Illinois Supreme Court relied on two cases to uphold the statute. In the first case, *Grayned* v. *City of Rockford*, 408 U. S. 104, 110, this Court noted in language quoted by the Illinois court that "[t]he words of the Rockford ordinance are marked by 'flexibility and reasonable breadth, rather than meticulous specificity . . . .'" The second case which the *Ridens II* court relied upon was its own decision in *People* v. *Raby*, 40 Ill. 2d 392, 240 N. E. 2d 595 (1968). That case concerned the alleged vagueness of a statute designed to prohibit public disorder. The Illinois court quoted the following language from *Raby*, and in the next sentence relied upon that decision and *Grayned* in upholding the statute's specificity:

"It is true that section 26–1 (a) does not attempt to particularize all

Nevertheless, this Court affirms the conviction in this Illinois case on two theories. The first is that this particular defendant had notice that the State considered these materials obscene, because prior Illinois cases had upheld obscenity convictions concerning similar material. But, if such notice is all that is required, it is difficult to understand why the *Miller* case itself was remanded for consideration of the specificity issue, see 413 U. S., at 37. For the description of

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of the myriad kinds of conduct that may fall within the statute. The legislature deliberately chose to frame the provision in general terms, prompted by the futility of an effort to anticipate and enumerate all of the methods of disrupting public order that fertile minds might devise." 40 Ill. 2d, at 396, 240 N. E. 2d, at 598.

Neither of these decisions requires conduct to be specifically defined; indeed, *Raby* notes that to survive a vagueness attack a statute need not "attempt to particularize all of the myriad kinds of conduct" within its bounds. This may be true for other vagueness attacks, but does not square with the special *Miller* requirement that conduct be specifically defined. Nowhere else in the *Ridens II* opinion does the Illinois Supreme Court limit the reach of the obscenity statute.

In the present case, the Illinois Supreme Court again considered the specificity problem, and again refused to narrow the statute:

"It was held in Ridens II that the obscenity statute was sufficiently clear and that it adequately informed the public of the conduct whose depiction is proscribed. We noted that the statutory definition of obscenity includes within the scope of the 'prurient interest' a 'shameful or morbid interest in nudity, sex or excretion.' The defendant argues that we erred in Ridens II in our interpretation of *Miller* and that *Miller* requires obscenity statutes to be much more specific in defining the type of material which will be considered obscene. We see no reason to reconsider our decision in Ridens II. It is extremely difficult to define the term 'obscenity' with a fine degree of precision. We again express our opinion that Illinois' statutory definition is sufficiently clear to withstand constitutional objections." 63 Ill. 2d 437, 441, 349 N. E. 2d 47, 49 (1976).

Thus, there does not appear to be anything in the Illinois decisions that would preclude the State from prosecuting forms of obscenity not "specifically defined" in prior decisions. And, as noted above, the statute provides no specific definition in this area.

the materials involved in *Miller* leaves no room for doubt that they were similar to materials which had often been the subject of prosecutions in the past; [5] there clearly was no question of fair notice.[6]

The Court's second theory is that, in any event, the Illinois statute is sufficiently specific to satisfy *Miller*. Although the statute does not contain an "exhaustive list" of specific examples, *ante*, at 776, it passes muster because it contains a generic reference to "the *kinds* of sexual conduct which may not be represented or depicted under the obscenity laws . . . ." *Ibid.* (emphasis in original). To hold that the list need not be exhaustive is to hold that a person can be prosecuted although the materials he sells are not specifically described in the list. Only five years ago, the Court promised that "no one" could be so prosecuted, *Miller*, 413 U. S., at 27. And if the statute need only describe the "kinds" of proscribed sexual conduct, it adds no protection to what the Constitution itself creates. For in *Jenkins* v. *Georgia*, 418 U. S. 153, this Court held that the Constitution protected all expression which is not "within either of the two examples given in *Miller*" or "sufficiently similar to such material to justify similar treatment." *Id.*, at 161.

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[5] The materials are described as follows in the opinion:

"While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed." 413 U. S., at 18.

The State's description was somewhat more specific:

"The materials involved are a collection of depictions of cunnilingus, sodomy, buggery and other similar sexual acts performed in groups of two or more." Brief for Appellee in No. 70-73, O. T. 1972, p. 26.

[6] If fair notice is the issue, it is hard to see how this can be provided by a narrowing construction made after the underlying conduct. Yet in *Hamling*, 418 U. S., at 115–116, the Court held such *ex post facto* "notice" sufficient.

One of the strongest arguments against regulating obscenity through criminal law is the inherent vagueness of the obscenity concept. The specificity requirement as described in *Miller* held out the promise of a principled effort to respond to that argument. By abandoning that effort today, the Court withdraws the cornerstone of the *Miller* structure and, undoubtedly, hastens its ultimate downfall. Although the decision is therefore a mixed blessing, I nevertheless respectfully dissent.

Syllabus

UNITED STATES *v.* LOVASCO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 75–1844. Argued March 21–22, 1977—Decided June 9, 1977

More than 18 months after federal criminal offenses were alleged to have occurred, respondent was indicted for committing them. Beyond an investigative report made a month after the crimes were committed, little additional information was developed in the following 17 months. Claiming that the preindictment delay, during which material defense testimony had been lost, deprived him of due process, respondent moved to dismiss the indictment. The District Court, which found that the delay had not been explained or justified and was unnecessary and prejudicial to respondent, granted the motion to dismiss. The Court of Appeals affirmed, concluding that the delay, which it found was solely attributable to the Government's hope that other participants in the crime would be discovered, was unjustified. *Held:* The Court of Appeals erred in affirming the District Court's dismissal of the indictment. Pp. 788–797.

(a) Although the Speedy Trial Clause of the Sixth Amendment is applicable only after a person has been accused of a crime and statutes of limitations provide "'the primary guarantee against bringing overly stale criminal charges,'" *United States* v. *Marion*, 404 U. S. 307, 322, those statutes do not fully define a defendant's rights with respect to events antedating the indictment, and the Due Process Clause has a limited role to play in protecting against oppressive delay. Pp. 788–789.

(b) While proof of prejudice makes a due process claim ripe for adjudication, it does not automatically validate such a claim, and the reasons for the delay must also be considered. Pp. 789–790.

(c) To prosecute a defendant following good-faith investigative delay, as apparently existed in this case, does not deprive him of due process even if his defense might have been somewhat prejudiced by the lapse of time. Prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied that they will be able to establish a suspect's guilt beyond a reasonable doubt. Nor is there a constitutional requirement that charges must be filed after there is sufficient evidence to prove such guilt but before the investigation is complete. An immediate arrest or indictment might impair the prosecutors' ability to continue the investigation or obtain additional indict-

ments, would pressure prosecutors into resolving doubtful cases in favor of early (and possibly unwarranted) prosecutions, and would preclude full consideration of the desirability of not prosecuting in particular cases. Pp. 790–796.

532 F. 2d 59, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 797.

John P. Rupp argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Thornburgh, Deputy Solicitor General Frey, Jerome M. Feit*, and *Robert H. Plaxico*.

Louis Gilden argued the cause and filed a brief for respondent.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

We granted certiorari in this case to consider the circumstances in which the Constitution requires that an indictment be dismissed because of delay between the commission of an offense and the initiation of prosecution.

I

On March 6, 1975, respondent was indicted for possessing eight firearms stolen from the United States mails, and for dealing in firearms without a license. The offenses were alleged to have occurred between July 25 and August 31, 1973, more than 18 months before the indictment was filed. Respondent moved to dismiss the indictment due to the delay.

The District Court conducted a hearing on respondent's motion at which the respondent sought to prove that the delay was unnecessary and that it had prejudiced his defense. In an effort to establish the former proposition, respondent presented a Postal Inspector's report on his investigation that was prepared one month after the crimes were com-

mitted, and a stipulation concerning the post-report progress of the probe. The report stated, in brief, that within the first month of the investigation respondent had admitted to Government agents that he had possessed and then sold five of the stolen guns, and that the agents had developed strong evidence linking respondent to the remaining three weapons.[1] The report also stated, however, that the agents had been unable to confirm or refute respondent's claim that he had found the guns in his car when he returned to it after visiting his son, a mail handler, at work.[2] The stipulation into which the Assistant United States Attorney entered indicated that little additional information concerning the crimes was uncovered in the 17 months following the preparation of the Inspector's report.[3]

To establish prejudice to the defense, respondent testified that he had lost the testimony of two material witnesses due to the delay. The first witness, Tom Stewart, died more than a year after the alleged crimes occurred. At the hearing

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[1] The report indicated that the person to whom respondent admitted selling five guns had told Government agents that respondent had actually sold him eight guns which he, in turn, had sold to one Martin Koehnken. The report also indicated that Koehnken had sold three of these guns to undercover federal agents and that a search of his house had uncovered four others. Finally the report stated that the eighth gun was sold by one David Northdruft (or Northdurft) to Government agents, and that Northdruft claimed Koehnken had sold him the gun.

At the hearing on the motion to dismiss, respondent for the first time admitted that he had possessed and sold eight guns.

[2] The only contrary evidence came from respondent's purchaser who told the Government investigators that he knew the guns were "hot."

[3] In March 1975, the Inspector learned of another person who claimed to have purchased a gun from respondent. App. 18. At the hearing the parties disagreed as to whether this evidence would have been admissible since it did not involve any of the guns to which the indictment related. *Id.*, at 9–10. In any event, the Assistant United States Attorney stated that the decision to prosecute was made before this additional piece of evidence was received. *Id.*, at 19.

respondent claimed that Stewart had been his source for two or three of the guns. The second witness, respondent's brother, died in April 1974, eight months after the crimes were completed. Respondent testified that his brother was present when respondent called Stewart to secure the guns, and witnessed all of respondent's sales. Respondent did not state how the witnesses would have aided the defense had they been willing to testify.[4]

The Government made no systematic effort in the District Court to explain its long delay. The Assistant United States Attorney did expressly disagree, however, with defense counsel's suggestion that the investigation had ended after the Postal Inspector's report was prepared. App. 9–10. The prosecutor also stated that it was the Government's theory that respondent's son, who had access to the mail at the railroad terminal from which the guns were "possibly stolen," *id.*, at 17, was responsible for the thefts, *id.*, at 13.[5] Finally, the prosecutor elicited somewhat cryptic testimony from the Postal Inspector indicating that the case "as to these particular weapons involves other individuals"; that information had been presented to a grand jury "in regard to this case other than . . . [on] the day of the indictment itself"; and that he had spoken to the prosecutors about the case on four or five occasions. *Id.*, at 20.

Following the hearing, the District Court filed a brief opinion and order. The court found that by October 2, 1973, the date of the Postal Inspector's report, "the Government had

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[4] Respondent admitted that he had not mentioned Stewart to the Postal Inspector when he was questioned about his source of the guns. He explained that this was because Stewart "was a bad tomato" and "was liable to take a shot at me if I told [on] him." *Id.*, at 13. Respondent also conceded that he did not mention either his brother's or Stewart's illness or death to the Postal Inspector on the several occasions in which respondent called the Inspector to inquire about the status of the probe.

[5] The Inspector's report had stated that there was no evidence establishing the son's responsibility for the thefts.

all the information relating to defendant's alleged commission of the offenses charged against him," and that the 17-month delay before the case was presented to the grand jury "had not been explained or justified" and was "unnecessary and unreasonable." The court also found that "[a]s a result of the delay defendant has been prejudiced by reason of the death of Tom Stewart, a material witness on his behalf." Pet. for Cert. 14a. Accordingly, the court dismissed the indictment.

The Government appealed to the United States Court of Appeals for the Eighth Circuit. In its brief the Government explained the months of inaction by stating:

> "[T]here was a legitimate Government interest in keeping the investigation open in the instant case. The defendant's son worked for the Terminal Railroad and had access to mail. It was the Government's position that the son was responsible for the theft and therefore further investigation to establish this fact was important.
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> ". . . Although the investigation did not continue on a full time basis, there was contact between the United States Attorney's office and the Postal Inspector's office throughout . . . and certain matters were brought before a Federal Grand Jury prior to the determination that the case should be presented for indictment . . . ." Brief for United States in No. 75–1852 (CA8), pp. 5–6.

The Court of Appeals accepted the Government's representation as to the motivation for the delay, but a majority of the court nevertheless affirmed the District Court's finding that the Government's actions were "unjustified, unnecessary, and unreasonable." 532 F. 2d 59, 61 (1976). The majority also found that respondent had established that his defense had been impaired by the loss of Stewart's testimony because it understood respondent to contend that "were Stewart's testimony available it would support [respondent's] claim that he did not know that the guns were stolen from the United States

mails." *Ibid.* The court therefore affirmed the District Court's dismissal of the three possession counts by a divided vote.[6]

We granted certiorari, 429 U. S. 884, and now reverse.[7]

II

In *United States* v. *Marion*, 404 U. S. 307 (1971), this Court considered the significance, for constitutional purposes, of a lengthy preindictment delay. We held that as far as the Speedy Trial Clause of the Sixth Amendment is concerned, such delay is wholly irrelevant, since our analysis of the language, history, and purposes of the Clause persuaded us that only "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge . . . engage the particular protections" of

[6] The court unanimously reversed the dismissal of a fourth count of the indictment charging respondent with dealing in firearms without a license since respondent had not alleged that the missing witnesses could have provided exculpatory evidence on this charge.

[7] In addition to challenging the Court of Appeals' holding on the constitutional issue, the United States argues that the District Court should have deferred action on the motion to dismiss until after trial, at which time it could have assessed any prejudice to the respondent in light of the events at trial. This argument, however, was not raised in the District Court or in the Court of Appeals. Absent exceptional circumstances, we will not review it here. See, *e. g.*, *Duignan* v. *United States*, 274 U. S. 195, 200 (1927); *Neely* v. *Martin K. Eby Constr. Co.*, 386 U. S. 317, 330 (1967).

At oral argument, the Government seemed to suggest that its failure to raise the procedural question in its brief in the Court of Appeals should be excused because the proceedings in that court were "skewed" by the fact that the District Court had based its dismissal solely on Fed. Rule Crim. Proc. 48 (b), and because the issue was raised by the Government in its petition for rehearing. Tr. of Oral Arg. 7–8, 51. But even assuming that the basis for the District Court's dismissal could have "skewed" appellate proceedings regarding the procedural question, the fact is that the opening paragraph of the argument in the Government's brief below recognized that the only issue before the court was a due process question,

that provision. *Id.*, at 320.[8] We went on to note that statutes of limitations, which provide predictable, legislatively enacted limits on prosecutorial delay, provide " 'the primary guarantee against bringing overly stale criminal charges.' " *Id.*, at 322, quoting *United States* v. *Ewell*, 383 U. S. 116, 122 (1966). But we did acknowledge that the "statute of limitations does not fully define [defendants'] rights with respect to the events occurring prior to indictment," 404 U. S., at 324, and that the Due Process Clause has a limited role to play in protecting against oppressive delay.

Respondent seems to argue that due process bars prosecution whenever a defendant suffers prejudice as a result of preindictment delay. To support that proposition respondent relies on the concluding sentence of the Court's opinion in *Marion* where, in remanding the case, we stated that "[e]vents of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature." *Id.*, at 326. But the quoted sentence establishes only that proof of actual prejudice makes a due process claim concrete and ripe for adjudication, not that it makes the claim automatically valid. Indeed, two pages earlier in the opinion we expressly rejected the argument respondent advances here:

> "[W]e need not . . . determine when and in what circumstances actual prejudice resulting from preaccusation delays requires the dismissal of the prosecution. Actual

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and the remainder of the brief treated that question on the merits. And even after the Court of Appeals issued its decision based solely on the Due Process Clause, the Government's petition for rehearing did not squarely raise the procedural issue as an alternative ground for rehearing the case en banc.

[8] *Marion* also holds that Fed. Rule Crim. Proc. 48 (b), which permits district courts to dismiss indictments due to preindictment or postindictment delay, is "limited to post-arrest situations." 404 U. S., at 319. Since respondent was not arrested until after he was indicted, the District Court plainly erred in basing its decision on this Rule.

> prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution." *Id.*, at 324–325. (Footnotes omitted.)

Thus *Marion* makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.

The Court of Appeals found that the sole reason for the delay here was "a hope on the part of the Government that others might be discovered who may have participated in the theft . . . ." 532 F. 2d, at 61. It concluded that this hope did not justify the delay, and therefore affirmed the dismissal of the indictment. But the Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. Judges are not free, in defining "due process," to impose on law enforcement officials our "personal and private notions" of fairness and to "disregard the limits that bind judges in their judicial function." *Rochin* v. *California*, 342 U. S. 165, 170 (1952). Our task is more circumscribed. We are to determine only whether the action complained of—here, compelling respondent to stand trial after the Government delayed indictment to investigate further—violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions," *Mooney* v. *Holohan*, 294 U. S. 103, 112 (1935), and which define "the community's sense of fair play and decency," *Rochin* v. *California*, *supra*, at 173. See also *Ham* v. *South Carolina*, 409 U. S. 524, 526 (1973); *Lisenba* v. *California*, 314 U. S. 219, 236 (1941); *Hebert* v. *Louisiana*, 272 U. S. 312, 316 (1926); *Hurtado* v. *California*, 110 U. S. 516, 535 (1884).

It requires no extended argument to establish that prosecutors do not deviate from "fundamental conceptions of

justice" when they defer seeking indictments until they have probable cause to believe an accused is guilty; indeed it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause.[9] It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. To impose such a duty "would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself," *United States* v. *Ewell, supra,* at 120. From the perspective of potential defendants, requiring prosecutions to commence when probable cause is established is undesirable because it would increase the likelihood of unwarranted charges being filed, and would add to the time during which defendants stand accused but untried.[10] These costs are by no means insubstantial since, as we recognized in *Marion,* a formal accusation may "interfere with the defendant's liberty, . . . disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." 404 U. S., at 320. From the perspective of law enforcement officials, a requirement of immediate prosecution upon probable cause is equally unacceptable because it could make obtaining proof of guilt beyond a reasonable doubt im-

[9] ABA Code of Professional Responsibility DR 7–103 (A) (1969); ABA Project on Standards for Criminal Justice, The Prosecution Function § 3.9 (App. Draft 1971).

[10] To the extent that the period between accusation and trial has been strictly limited by legislative action, see, *e. g.*, Speedy Trial Act of 1974, 88 Stat. 2076, 18 U. S. C. § 3161 *et seq.* (1970 ed., Supp. V), compelling immediate prosecutions upon probable cause would not add to the time during which defendants stand accused, but would create a risk of guilty persons escaping punishment simply because the Government was unable to move from probable cause to guilt beyond a reasonable doubt in the short time available to it. Even absent a statute, of course, the Speedy Trial Clause of the Sixth Amendment imposes restraints on the length of post-accusation delay.

possible by causing potentially fruitful sources of information to evaporate before they are fully exploited.[11] And from the standpoint of the courts, such a requirement is unwise because it would cause scarce resources to be consumed on cases that prove to be insubstantial, or that involve only some of the responsible parties or some of the criminal acts.[12] Thus, no one's interests would be well served by compelling prosecutors to initiate prosecutions as soon as they are legally entitled to do so.[13]

It might be argued that once the Government has assembled sufficient evidence to prove guilt beyond a reasonable doubt, it should be constitutionally required to file charges promptly, even if its investigation of the entire criminal transaction is not complete. Adopting such a rule, however, would have many of the same consequences as adopting a rule requiring immediate prosecution upon probable cause.

First, compelling a prosecutor to file public charges as soon as the requisite proof has been developed against one

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[11] Cf. *United States* v. *Watson*, 423 U. S. 411, 431 (1976) (POWELL, J., concurring) ("Good police practice often requires postponing an arrest, even after probable cause has been established, in order to place the suspect under surveillance or otherwise develop further evidence necessary to prove guilt to a jury").

[12] Defendants also would be adversely affected by trials involving less than all of the criminal acts for which they are responsible, since they likely would be subjected to multiple trials growing out of the same transaction or occurrence.

[13] See also *Hoffa* v. *United States*, 385 U. S. 293, 310 (1966), quoted in *United States* v. *Marion*, 404 U. S., at 325 n. 18:

"There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction."

participant on one charge would cause numerous problems in those cases in which a criminal transaction involves more than one person or more than one illegal act. In some instances, an immediate arrest or indictment would impair the prosecutor's ability to continue his investigation, thereby preventing society from bringing lawbreakers to justice. In other cases, the prosecutor would be able to obtain additional indictments despite an early prosecution, but the necessary result would be multiple trials involving a single set of facts. Such trials place needless burdens on defendants, law enforcement officials, and courts.

Second, insisting on immediate prosecution once sufficient evidence is developed to obtain a conviction would pressure prosecutors into resolving doubtful cases in favor of early—and possibly unwarranted—prosecutions. The determination of when the evidence available to the prosecution is sufficient to obtain a conviction is seldom clear-cut, and reasonable persons often will reach conflicting conclusions. In the instant case, for example, since respondent admitted possessing at least five of the firearms, the primary factual issue in dispute was whether respondent knew the guns were stolen as required by 18 U. S. C. § 1708. Not surprisingly, the Postal Inspector's report contained no direct evidence bearing on this issue. The decision whether to prosecute, therefore, required a necessarily subjective evaluation of the strength of the circumstantial evidence available and the credibility of respondent's denial. Even if a prosecutor concluded that the case was weak and further investigation appropriate, he would have no assurance that a reviewing court would agree. To avoid the risk that a subsequent indictment would be dismissed for preindictment delay, the prosecutor might feel constrained to file premature charges, with all the disadvantages that would entail.[14]

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[14] In addition, if courts were required to decide in every case when the prosecution should have commenced, it would be necessary for them to

Finally, requiring the Government to make charging decisions immediately upon assembling evidence sufficient to establish guilt would preclude the Government from giving full consideration to the desirability of not prosecuting in particular cases. The decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government's case, in order to determine whether prosecution would be in the public interest.[15] Prosecutors often need more information than proof of a suspect's guilt, therefore, before deciding whether to seek an indictment. Again the instant case provides a useful illustration. Although proof of the identity of the mail thieves was not necessary to convict respondent of the possessory crimes with which he was charged, it might have been crucial in assessing respondent's culpability, as distinguished from his legal guilt. If, for example, further investigation were to show that respondent had no role in or advance knowledge of the theft and simply

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trace the day-by-day progress of each investigation. Maintaining daily records would impose an administrative burden on prosecutors, and reviewing them would place an even greater burden on the courts. See also *United States* v. *Marion*, *supra*, at 321 n. 13.

[15] See, *e. g.*, The Prosecution Function, *supra*, n. 9, at § 3.9 (b):

"The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

"(i) the prosecutor's reasonable doubt that the accused is in fact guilty;

"(ii) the extent of the harm caused by the offense;

"(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;

"(iv) possible improper motives of a complainant;

"(v) reluctance of the victim to testify;

"(vi) cooperation of the accused in the apprehension or conviction of others;

"(vii) availability and likelihood of prosecution by another jurisdiction."

agreed, out of paternal loyalty, to help his son dispose of the guns once respondent discovered his son had stolen them, the United States Attorney might have decided not to prosecute, especially since at the time of the crime respondent was over 60 years old and had no prior criminal record.[16] Requiring prosecution once the evidence of guilt is clear, however, could prevent a prosecutor from awaiting the information necessary for such a decision.

We would be most reluctant to adopt a rule which would have these consequences absent a clear constitutional command to do so. We can find no such command in the Due Process Clause of the Fifth Amendment. In our view, investigative delay is fundamentally unlike delay undertaken by the Government solely "to gain tactical advantage over the accused," *United States* v. *Marion*, 404 U. S., at 324, precisely because investigative delay is not so one-sided.[17] Rather than deviating from elementary standards of "fair play and decency," a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of "orderly expedition" to that of "mere speed," *Smith* v. *United States*,

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[16] Of course, in this case further investigation proved unavailing and the United States Attorney ultimately decided to prosecute based solely on the Inspector's report. But this fortuity cannot transform an otherwise permissible delay into an impermissible one.

[17] In *Marion* we noted with approval that the Government conceded that a "tactical" delay would violate the Due Process Clause. The Government renews that concession here, Brief for United States 32, and expands it somewhat by stating: "A due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense," *id.*, at 32–33, n. 25. As the Government notes, however, there is no evidence of recklessness here.

360 U. S. 1, 10 (1959). This the Due Process Clause does not require. We therefore hold that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.

In the present case, the Court of Appeals stated that the only reason the Government postponed action was to await the results of additional investigation. Although there is, unfortunately, no evidence concerning the reasons for the delay in the record, the court's "finding" is supported by the prosecutor's implicit representation to the District Court, and explicit representation to the Court of Appeals, that the investigation continued during the time that the Government deferred taking action against respondent. The finding is, moreover, buttressed by the Government's repeated assertions in its petition for certiorari, its brief, and its oral argument in this Court, "that the delay was caused by the government's efforts to identify persons in addition to respondent who may have participated in the offenses." Pet. for Cert. 14.[18] We must assume that these statements by counsel have been made in good faith. In light of this explanation, it follows that compelling respondent to stand trial would not be fundamentally unfair. The Court of Appeals therefore erred in affirming the District Court's decision dismissing the indictment.

III

In *Marion* we conceded that we could not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions. 404 U. S., at 324. More than five years later, that statement remains true. Indeed, in the intervening years so few defendants have established that they were prejudiced by delay that neither this Court

[18] See also Pet. for Cert. 4, 8; Brief for United States 3, 8, 38; Tr. of Oral Arg. 4, 7, 10, 47.

nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay.[19] We therefore leave to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases. We simply hold that in this case the lower courts erred in dismissing the indictment.

Reversed.

MR. JUSTICE STEVENS, dissenting.

If the record presented the question which the Court decides today, I would join its well-reasoned opinion. I am unable

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[19] Professor Amsterdam has catalogued some of the noninvestigative reasons for delay:

"[P]roof of the offense may depend upon the testimony of an undercover informer who maintains his 'cover' for a period of time before surfacing to file charges against one or more persons with whom he has dealt while disguised. . . . [I]f there is more than one possible charge against a suspect, some of them may be held back pending the disposition of others, in order to avoid the burden upon the prosecutor's office of handling charges that may turn out to be unnecessary to obtain the degree of punishment that the prosecutor seeks. There are many other motives for delay, of course, including some sinister ones, such as a desire to postpone the beginning of defense investigation, or the wish to hold a 'club' over the defendant.

"Additional reasons for delay may be partly or completely beyond the control of the prosecuting authorities. Offenses may not be immediately reported; investigation may not immediately identify the offender; an identified offender may not be immediately apprehendable. . . . [A]n indictment may be delayed for weeks or even months until the impaneling of the next grand jury. It is customary to think of these delays as natural and inevitable . . . but various prosecutorial decisions—such as the assignment of manpower and priorities among investigations of known offenses—may also affect the length of such delays." Speedy Criminal Trial: Rights and Remedies, 27 Stan. L. Rev. 525, 527–728 (1975).

See also *Dickey* v. *Florida*, 398 U. S. 30, 45–46, n. 9 (1970) (BRENNAN, J., concurring).

to do so because I believe our review should be limited to the facts disclosed by the record developed in the District Court and the traditional scope of review we have exercised with regard to issues of fact.

After a thorough hearing on the respondent's motion to dismiss the indictment for prejudicial preindictment delay—a hearing at which both sides were given every opportunity to submit evidence concerning the question—the District Court found that "[t]he Government's delay ha[d] not been explained or justified and [was] unnecessary and unreasonable." On appeal, the Court of Appeals concurred, noting that the District Court's determination was "supported by the evidence." 532 F. 2d 59, 60–61 (CA8 1976). These concurrent findings of fact make it improper, in my judgment, for this Court to make its own determination that "the Government postponed action . . . to await the results of additional investigation," *ante*, at 796.[1]

That determination is not supported by the record.[2] The

[1] It is a settled rule of this Court that we will not review concurrent findings of fact by two courts "'in the absence of a very obvious and exceptional showing of error.'" *Berenyi* v. *Immigration Director*, 385 U. S. 630, 635, citing *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275. Mr. Justice Jackson has called this a "seasoned and wise rule . . . ." *Comstock* v. *Group of Investors*, 335 U. S. 211, 214.

[2] An examination of the transcript of the District Court hearing reveals that the Government produced *no evidence* as to why the indictment was delayed. The Government stipulated that it proceeded before the grand jury only on evidence collected some 17 months before the presentation and that no additional evidence had caused it to proceed. Although the Court of Appeals surmised that "[n]o reason existed for the delay except a hope on the part of the Government that others might be discovered who may have participated in the theft[s] . . . ," 532 F. 2d, at 61, even this assumption is not borne out by the record of the District Court hearing. Although not under oath, the prosecuting attorney indicated that the Government theorized that the guns in question came from the respondent's son, who worked at a freight terminal and would have had access to the mails. Yet even this theory was never shown to be the cause of the delay. Not even the prosecuting attorney stated as much.

majority opinion correctly points out that there was "no evidence concerning the reasons for delay in the record," and yet proceeds to accept as fact the representations in the Government's briefs to the Court of Appeals and to this Court that " 'the delay was caused by the government's efforts to identify persons in addition to respondent who may have participated in the offenses.' " *Ibid.* This finding of a continuing investigation, which forms the foundation of the majority opinion, comes from statements of counsel made during the appellate process. As we have said of other unsworn statements which were not part of the record and therefore could not have been considered by the trial court: "Manifestly, [such statements] cannot be properly considered by us in the disposition of [a] case." *Adickes* v. *Kress & Co.*, 398 U. S. 144, 157–158, n. 16. While I do not question the good faith of Government counsel, it is not the business of appellate courts to make decisions on the basis of unsworn matter not incorporated in a formal record.

The findings of the District Court, as approved by the Court of Appeals, establish four relevant propositions: (1) this is a routine prosecution; (2) after the Government assembled all of the evidence on which it expects to establish respondent's guilt, it waited almost 18 months to seek an indictment; (3) the delay was prejudicial to respondent's defense; and (4) no reason whatsoever explains the delay. We may reasonably infer that the prosecutor was merely busy with other matters that he considered more important than this case.

The question presented by those facts is not an easy one. Nevertheless, unless we are to conclude that the Constitution imposes no constraints on the prosecutor's power to postpone the filing of formal charges to suit his own convenience, I believe we must affirm the judgment of the Court of Appeals. A contrary position "can be tenable only if one assumes that the constitutional right to a fair hearing includes no right

whatsoever to a prompt hearing." *Moody* v. *Daggett*, 429 U. S. 78, 91 (STEVENS, J., dissenting). The requirement of speedy justice has been part of the Anglo-American common-law tradition since the Magna Carta. See *id.*, at 92 n. 5. It came to this country and was embodied in the early state constitutions, see the Massachusetts Constitution of 1780, Part I, Art. XI, and later in the Sixth Amendment to the United States Constitution. As applied to this case, in which respondent made numerous anxious inquiries of the Postal Inspectors concerning whether he would be indicted, in which the delay caused substantial prejudice to the respondent, and in which the Government has offered no justification for the delay, the right to speedy justice should be honored.

If that right is not honored in a case of this kind, the basic values which the Framers intended to protect by the Sixth Amendment's guarantee of a speedy trial, and which motivated Congress to enact the Speedy Trial Act of 1974, will become nothing more than managerial considerations for the prosecutor to manipulate.

I respectfully dissent.

Syllabus

LEFKOWITZ, ATTORNEY GENERAL OF NEW YORK *v.* CUNNINGHAM ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 76-260. Argued February 28-March 1, 1977—Decided June 13, 1977

A New York statute provides that if an officer of a political party subpoenaed by a grand jury or other authorized tribunal to testify concerning the conduct of his office refuses to testify or to waive immunity against subsequent criminal prosecution, his term of office shall terminate and he shall be disqualified from holding any other party or public office for five years. Appellee, an attorney, was divested of his state political party offices pursuant to this statute when, in response to a subpoena, he appeared before a grand jury and refused to waive his constitutional immunity. He then brought suit in Federal District Court, which granted him declaratory and injunctive relief against enforcement of the statute on the ground that it violated his Fifth and Fourteenth Amendment rights. *Held:* The statute violated appellee's right to be free of compelled self-incrimination under the Fifth Amendment. Pp. 804-809.

(a) Government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony that has not been immunized. Pp. 804-806.

(b) The statute was coercive against appellee because it threatened him with loss of powerful offices and because the compelled forfeiture of those offices would diminish his general reputation in the community, would, as economic consequences, harm his professional standing as a practicing lawyer and bar him from holding any other party or public office for five years, and would impinge on his First Amendment right to participate in private, voluntary political associations. Pp. 807-808.

(c) The State's overriding interest in preserving public confidence in the integrity of its political process is insufficient to justify forcing its citizens to incriminate themselves. P. 808.

(d) The State's dilemma in being forced to choose between an accounting from, and a prosecution of, a party officer is created by its own transactional immunity law, whereas the more limited use immunity required by the Fifth Amendment would permit the State to compel

testimony without forfeiting the opportunity to prosecute the witness on the basis of evidence derived from other sources. Pp. 808–809.

420 F. Supp. 1004, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined, and in all but Part (4) of which BRENNAN and MARSHALL, JJ., joined. BRENNAN, J., filed an opinion concurring in part, in which MARSHALL, J., joined, *post*, p. 809. STEVENS, J., filed a dissenting opinion, *post*, p. 810. REHNQUIST, J., took no part in the consideration or decision of the case.

Irving Galt, Assistant Attorney General of New York, argued the cause for appellant. With him on the brief were *Louis J. Lefkowitz*, Attorney General, *pro se*, and *Mark C. Rutzick*, Assistant Attorney General.

Michael E. Tigar argued the cause for appellees. With him on the brief were *Edward Bennett Williams* and *Harold Ungar*.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This appeal presents the question whether a political party officer can be removed from his position by the State of New York and barred for five years from holding any other party or public office, because he has refused to waive his constitutional privilege against compelled self-incrimination.

(1)

Under § 22 of the New York Election Law,[1] an officer of a

**Burt Neuborne, Melvin L. Wulf,* and *Joel M. Gora* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

[1] "If any party officer shall, after lawful notice of process, wilfully refuse or fail to appear before any court or judge, grand jury, legislative committee, officer, board or body authorized to conduct any hearing or inquiry concerning the conduct of his party office or the performance of his duties, or having appeared, shall refuse to testify or answer any relevant question, or shall refuse to sign a waiver of immunity against subsequent criminal prosecution, his term or tenure of office shall terminate,

political party may be subpoenaed by a grand jury or other authorized tribunal and required to testify concerning his conduct of the party office he occupies. If the officer refuses to answer any question, or if he declines to waive immunity from the use of his testimony against him in a later prosecution, the statute immediately terminates his party office and prohibits him from holding any other party or public office for a period of five years.

In December 1975, appellee Patrick J. Cunningham (hereafter appellee) was subpoenaed pursuant to § 22 to appear and testify before a special grand jury authorized to investigate his conduct in the political offices he then held, which consisted of four unsalaried elective positions in the Democratic Party of the State of New York.[2] Appellee moved to quash the subpoena in the state courts, arguing in part that § 22 violated his federal constitutional right to be free of compelled self-incrimination; his motion was denied. *In re Cunningham* v. *Nadjari*, 51 App. Div. 2d 927, 383 N. Y. S. 2d 311, aff'd, 39 N. Y. 2d 314, 347 N. E. 2d 915 (1976). On April 12, 1976, he appeared before the grand jury in response to the subpoena. Appellee refused to sign a waiver of immunity form which would have waived his constitutional right not to be compelled to incriminate himself.[3] Because § 22 is self-executing, appel-

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such office shall be vacant and he shall be disqualified from holding any party or public office for a period of five years." N. Y. Elec. Law § 22 (McKinney 1964).

New York Election Law § 2 (9) (McKinney 1964) defines a party officer as "one who holds any party position or any party office whether by election, appointment or otherwise."

[2] Appellee was chairman of the State Democratic Committee and the Bronx County Democratic Executive Committee, and a member of the Executive Committee of the New York State Democratic Committee and the Bronx County Democratic Executive Committee. We are advised that appellee has recently resigned as chairman of the state organization. He retains his other party offices.

[3] In the absence of an effective waiver, New York law would have entitled appellee to transactional immunity from prosecution on all matters

lee's refusal to waive his constitutional immunity automatically divested him of all his party offices and activated the five-year ban on holding any public or party office.

The following day, appellee commenced this action in the United States District Court for the Southern District of New York. After hearing, the District Judge entered a temporary restraining order against enforcement of § 22. A three-judge court was then convened, and that court granted appellee declaratory and permanent injunctive relief against enforcement of § 22 on the ground that it violated appellee's Fifth and Fourteenth Amendment rights. We noted probable jurisdiction, 429 U. S. 893 (1976). We affirm.

(2)

We begin with the proposition that the Fifth Amendment privilege against compelled self-incrimination protects grand

about which he testified. N. Y. Crim. Proc. Law §§ 50.10, 190.40, 190.45 (McKinney 1971 and Supp. 1976–1977). As appellant concedes, however, Tr. of Oral Arg. 4–5, and as the record reflects, the State also insisted on a waiver of the more limited use immunity which we have held essential to protect Fifth Amendment rights. *Kastigar* v. *United States*, 406 U. S. 441 (1972).

The waiver form which appellee's counsel represents is presented to grand jury witnesses waives "all immunity and privileges which I would otherwise obtain under the provisions of the Constitution of the United States and of the State of New York" and further "consent[s] to the use against me of the testimony so given . . . upon any criminal trial, investigation, prosecution or proceeding." McKinney's Forms for the Criminal Procedure Law § 190.45, Form 1 (1971). See N. Y. Crim. Proc. Law § 190.45. Appellee's refusal to sign this waiver form, pressed on him immediately before taking the oath, was in these circumstances an effective assertion of his Fifth Amendment privilege.

Of course, New York's procedure in this regard is not constitutionally required. Rather than permit an assertion of the Fifth Amendment privilege to confer immunity with respect to all matters testified to before the grand jury, New York could, if it chose, require a witness to assert his constitutional privilege to the specific questions he deems potentially incriminating, withholding constitutional use immunity until the validity of the assertion is upheld.

jury witnesses from being forced to give testimony which may later be used to convict them in a criminal proceeding. See, *e. g., United States* v. *Washington, ante,* at 186–187. Moreover, since the test is whether the testimony might later subject the witness to criminal prosecution, the privilege is available to a witness in a civil proceeding, as well as to a defendant in a criminal prosecution. *Malloy* v. *Hogan,* 378 U. S. 1, 11 (1964). In either situation the witness may "refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." *Lefkowitz* v. *Turley,* 414 U. S. 70, 78 (1973).

Thus, when a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution. In *Garrity* v. *New Jersey,* 385 U. S. 493 (1967), for example, police officers under investigation were told that if they declined to answer potentially incriminating questions they would be removed from office, but that any answers they did give could be used against them in a criminal prosecution. We held that statements given under such circumstances were made involuntarily and could not be used to convict the officers of crime.

Similarly, our cases have established that a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself. In *Gardner* v. *Broderick,* 392 U. S. 273 (1968), a police officer appearing before a grand jury investigating official corruption was subject to discharge if he did not waive his Fifth Amendment privilege and answer, without immunity, all questions asked of him. When he refused, and his employment was terminated, this Court held that the officer could not be discharged solely for his refusal to forfeit the rights guaranteed him by the Fifth Amendment; the privilege against compelled self-incrimina-

tion could not abide any "attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment." *Id.*, at 279. Accord, *Sanitation Men* v. *Sanitation Comm'r*, 392 U. S. 280 (1968). At the same time, the Court provided for effectuation of the important public interest in securing from public employees an accounting of their public trust. Public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity. *Gardner, supra,* at 278–279.

We affirmed the teaching of *Gardner* more recently in *Lefkowitz* v. *Turley, supra,* where two architects who did occasional work for the State of New York refused to waive their Fifth Amendment privilege before a grand jury investigating corruption in public contracting practices. State law provided that if a contractor refused to surrender his constitutional privilege before a grand jury, his existing state contracts would be canceled, and he would be barred from future contracts with the State for five years. The Court saw no constitutional distinction between discharging a public employee and depriving an independent contractor of the opportunity to secure public contracts; in both cases the State had sought to compel testimony by imposing a sanction as the price of invoking the Fifth Amendment right.

These cases settle that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized. It is true, as appellant points out, that our earlier cases were concerned with penalties having a substantial economic impact. But the touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids.

(3)

Section 22 confronted appellee with grave consequences solely because he refused to waive immunity from prosecution and give self-incriminating testimony. Section 22 is therefore constitutionally indistinguishable from the coercive provisions we struck down in *Gardner*, *Sanitation Men*, and *Turley*. Appellee's party offices carry substantial prestige and political influence, giving him a powerful voice in recommending or selecting candidates for office and in other political decisions. The threatened loss of such widely sought positions, with their power and perquisites, is inherently coercive. Additionally, compelled forfeiture of these posts diminishes appellee's general reputation in his community.

There are also economic consequences; appellee's professional standing as a practicing lawyer would suffer by his removal from his political offices under these circumstances. Further, § 22 bars appellee from holding any other party or public office for five years. Many such offices carry substantial compensation. Appellant argues that appellee has no enforceable property interest in future office, but neither did the architects in *Turley* have an enforceable claim to future government contracts. Nevertheless, we found that disqualification from eligibility for such contracts was a substantial economic burden. In assessing the coercion which § 22 exerts, we must take into account potential economic benefits realistically likely of attainment. Prudent persons weigh heavily such legally unenforceable prospects in making decisions; to that extent, removal of those prospects constitutes economic coercion.[4]

Section 22 is coercive for yet another reason: It requires appellee to forfeit one constitutionally protected right as the

[4] That appellee's refusal to waive immunity and answer questions concerning his conduct of office may have already damaged his reputation and standing is irrelevant to the issues in this case; it is inescapable that public judgments are often made on such factors.

price for exercising another. See *Simmons* v. *United States*, 390 U. S. 377, 394 (1968). As an officer in a private political party, appellee is in a far different position from a government policymaking official holding office at the pleasure of the President or Governor. By depriving appellee of his offices, § 22 impinges on his right to participate in private, voluntary political associations. That right is an important aspect of First Amendment freedom which this Court has consistently found entitled to constitutional protection. *Kusper* v. *Pontikes*, 414 U. S. 51 (1973); *Williams* v. *Rhodes*, 393 U. S. 23 (1968).

Appellant argues that even if § 22 is violative of Fifth Amendment rights, the State's overriding interest in preserving public confidence in the integrity of its political process justifies the constitutional infringement. We have already rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need. *E. g.*, *Lefkowitz* v. *Turley*, 414 U. S., at 78–79. Government has compelling interests in maintaining an honest police force and civil service, but this Court did not permit those interests to justify infringement of Fifth Amendment rights in *Garrity*, *Gardner*, and *Sanitation Men*, where alternative methods of promoting state aims were no more apparent than here.[5]

(4)

It may be, as appellant contends, that "[a] State

[5] *Baxter* v. *Palmigiano*, 425 U. S. 308 (1976), is not to the contrary. That case involved an administrative disciplinary proceeding in which the respondent was advised that he was not required to testify, but that if he chose to remain silent his silence could be considered against him. *Baxter* did no more than permit an inference to be drawn in a civil case from a party's refusal to testify. Respondent's silence in *Baxter* was only one of a number of factors to be considered by the finder of fact in assessing a penalty, and was given no more probative value than the facts of the case warranted; here, refusal to waive the Fifth Amendment privilege leads automatically and without more to imposition of sanctions.

forced to choose between an accounting from or a prosecution of a party officer is in an intolerable position." Brief for Appellant 12–13. But this dilemma is created by New York's transactional immunity law, which immunizes grand jury witnesses from prosecution for any transaction about which they testify. The more limited use immunity required by the Fifth Amendment would permit the State to prosecute appellee for any crime of which he may be guilty in connection with his party office, provided only that his own compelled testimony is not used to convict him. Once proper use immunity is granted, the State may use its contempt powers to compel testimony concerning the conduct of public office, without forfeiting the opportunity to prosecute the witness on the basis of evidence derived from other sources.

Accordingly, the judgment is

Affirmed.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in part.

I join the Court's judgment, for the reasons stated in Parts (1), (2), and (3) of its opinion. I cannot, however, join Part (4), because I continue to believe that "the Fifth Amendment privilege against self-incrimination requires that any jurisdiction that compels a man to incriminate himself grant him absolute immunity under its laws from prosecution for any transaction revealed in that testimony." *Piccirillo* v. *New York*, 400 U. S. 548, 562 (1971) (BRENNAN, J., dissenting). See also *Kastigar* v. *United States*, 406 U. S. 441, 462 (1972) (Douglas, J., dissenting); *id.*, at 467 (MARSHALL, J., dissenting). Moreover, even on the Court's assumption that a lesser immunity is sufficient to satisfy the requirements of the Fifth Amendment, I question the propriety of the Court's suggestion that the New York Legislature's decision to grant

additional protection to the Fifth Amendment rights of grand jury witnesses was somehow contrary to the State's best interests.

MR. JUSTICE STEVENS, dissenting.

The First Amendment protects the individual's right to speak and to believe in accordance with the dictates of his own conscience. But if he believes in peace at any price and speaks out against a strong military, the President may decide not to nominate him for the office of Secretary of Defense. If he already occupies a comparable policymaking office, the President may remove him as a result of his exercise of First Amendment rights. The fact that the Constitution protects the exercise of the right does not mean that it also protects the speaker's "right" to hold high public office.[1]

The Fifth Amendment protects the individual's right to remain silent. The central purpose of the privilege against compulsory self-incrimination is to avoid unfair criminal trials. It is an expression of our conviction that the defendant in a criminal case must be presumed innocent, and that the State has the burden of proving guilt without resorting to an inquisition of the accused.[2]

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[1] It is often incorrectly assumed that whenever an individual right is sufficiently important to receive constitutional protection, that protection implicitly guarantees that the exercise of the right shall be cost free. Nothing could be further from the truth. The right to representation by counsel of one's choice, for example, may require the defendant in a criminal case to pay a staggering price to employ the lawyer he selects. Insistence on a jury trial may increase the cost of defense. The right to send one's children to a private school, *Meyer* v. *Nebraska*, 262 U. S. 390, may be exercised only by one prepared to pay the associated tuition cost.

[2] E. Griswold, The Fifth Amendment Today 1–8 (1955); L. Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination (1968); Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 Va. L. Rev. 763 (1935). The

Just as constitutionally protected speech may disclose a valid reason for terminating the speaker's employment, so may constitutionally protected silence provide a valid reason for refusing or terminating employment in certain sensitive public positions. Thus a person nominated to an office which may not be filled without the consent of the Senate could exercise his right not to incriminate himself during questioning by a Senate committee, but no one would doubt the Senate's constitutional power to withhold its consent for that very reason. Nor can there be any doubt concerning the President's power to discharge any White House aide who might assert his Fifth Amendment privilege in response to a charge that he had used his office to conceal wrongdoing or to solicit illegal campaign contributions.

I see no reason why there should be any greater doubt concerning a state governor's power to discharge an appointed member of his personal staff who asserts his Fifth Amendment privilege before a grand jury investigating accusations of influence peddling in state government.[3] And since a constitutional limitation on the power of the "government," see *ante*, at 806, applies equally to the legislature and the executive, a statutory restriction is no more objectionable than an executive order.

My comments thus far have related to policymaking officials who seek or occupy positions which have no exact counterpart in the private sector of the economy. In our democracy, their power to govern is ultimately derived from, and dependent upon, the sanction of the citizenry they serve.

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privilege has engendered a great deal of legal scholarship over the years. See Dean Griswold's thoughtful review of the literature and of his own writings in The Right to be Let Alone, 55 Nw. U. L. Rev. 216 (1960). See also Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. Cin. L. Rev. 671, 706–708 (1968).

[3] See, *e. g.*, *Scott* v. *Philadelphia Parking Auth.*, 402 Pa. 151, 154, 166 A. 2d 278, 280–281 (1960); *Mitchell* v. *Chester Housing Auth.*, 389 Pa. 314, 328, 132 A. 2d 873, 880 (1957).

Their performance in office not only must satisfy high standards of competence and efficiency but must also inspire confidence in the integrity of their leadership.[4] For that reason, conditions may appropriately be attached to the holding of high public office that would be entirely inappropriate for the vast majority of government employees whose work is not significantly different from that performed in the private sector.[5]

The Court has decided in the past that workers such as sanitation men employed by a state-chartered municipality may not be threatened with the loss of their livelihood in order to compel them to waive their privilege against self-incrimination.[6] Neither that decision, nor any in its line,[7] controls this case. For rules which protect the rights of government workers whose jobs are not fundamentally different from positions in other areas of society are not automatically applicable to policymaking officials of government.[8]

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[4] Note, A Constitutional Analysis of the Spoils System, 57 Iowa L. Rev. 1320, 1321 n. 12 (1972); Note, 17 Vill. L. Rev. 750, 753–754 (1972); Note, 26 Vand. L. Rev. 1090, 1092 n. 12 (1973).

A line of cases in the Seventh Circuit has addressed the distinction between policymaking and nonpolicymaking state employees, *Indiana State Employees Assn., Inc.* v. *Negley*, 501 F. 2d 1239 (1974); *Adams* v. *Walker*, 492 F. 2d 1003, 1007 (1974); *Illinois State Employees Union, Council 34* v. *Lewis*, 473 F. 2d 561, 574 (1972), cert. denied, 410 U. S. 928; *Gould* v. *Walker*, 356 F. Supp. 421 (ND Ill. 1973). See *Pickering* v. *Board of Education*, 391 U. S. 563, 570, and n. 3.

[5] See *Orloff* v. *Willoughby*, 345 U. S. 83, 90–92; *Napolitano* v. *Ward*, 457 F. 2d 279 (CA7 1972).

[6] *Sanitation Men* v. *Sanitation Comm'r*, 392 U. S. 280.

[7] *Lefkowitz* v. *Turley*, 414 U. S. 70; *Gardner* v. *Broderick*, 392 U. S. 273; *Garrity* v. *New Jersey*, 385 U. S. 493.

[8] Cf. *Elrod* v. *Burns*, 427 U. S. 347, 367–368 (plurality opinion); *Sugarman* v. *Dougall*, 413 U. S. 634, 642–643; *United Public Workers* v. *Mitchell*, 330 U. S. 75, 115, 122–123 (Douglas, J., dissenting in part); *Myers* v. *United States*, 272 U. S. 52, 240–241 (Brandeis, J. dissenting); *Indiana State Employees Assn., Inc.* v. *Negley*, *supra*; *Mow Sun Wong* v.

Appellee Cunningham (hereinafter appellee) is a policymaking official occupying a sensitive position in the government of the State of New York. He is chairman of the State Democratic Committee and of the Bronx County Democratic Executive Committee. By virtue of holding those party positions he performs several important statutory offices for the State of New York.[9] If "heed is to be given to the realities of political life, [he is one of] the instruments by which government becomes a living thing." *Nixon* v. *Condon*, 286 U. S. 73, 84. The leaders of a major political party "are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly." *Id.*, at 88.

The State has a legitimate interest, not only in preventing actual corruption, but also in avoiding the appearance of corruption[10] among those it favors with sensitive, policymaking office. If such a person wishes to exercise his constitutional right to remain silent and refuses to waive his privilege against compulsory self-incrimination, I see no rea-

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Hampton, 500 F. 2d 1031, 1040 (CA9 1974), aff'd, 426 U. S. 88, 95–96; *Leonard* v. *Douglas*, 116 U. S. App. D. C. 136, 321 F. 2d 749 (1963).

[9] Appellee selects nominees for commissioner of the State Board of Elections which administers New York elections, N. Y. Elec. Law § 468 (McKinney Supp. 1976–1977). He has similar powers with respect to local election officers, §§ 31, 40, 45 (McKinney 1964). The committees he chairs have the power to designate candidates for office in party primary elections, § 131 (2), to fill vacancies which occur in the party slate in Bronx County, §§ 131, 140, and to nominate Democratic electors for the offices of President and Vice President of the United States, § 131 (1).

[10] See *Buckley* v. *Valeo*, 424 U. S. 1, 25–27. To the extent that it legitimizes the Government's concern with the integrity of the election process, *Buckley* is particularly apposite here. The majority of the appellee's statutory powers concern the administration and enforcement of New York's election laws.

son why the State should not have the power to remove him from office.[11]

I recognize that procedures are available by which the State may compel *any* of its employees to render an accounting of his or her office in exchange for a grant of immunity.[12]

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[11] Of course, it may not do so because it wishes to punish him for the exercise of his right, or as a substitute punishment for the crimes of which he might be suspected. But the State does have a legitimate interest in the integrity, and in the appearance of integrity, of those serving in its governing core. Cf. *In re Daley*, 549 F. 2d 469, 474–477 (CA7 1977).

Appellee's removal from a statutorily recognized state political office does not deprive him of his right to associate for political reasons, see *ante*, at 807–808. The impact on this right is surely no more significant than the impact of the statute on his privilege against compulsory self-incrimination. For § 22 leaves appellee free to participate in Democratic Party political activities in all the capacities recognized as protected by our right-to-associate cases.

Nor does this case present the question whether the imposition of the five-year ban on holding state office contained in § 22 may be invalid as a penalty.

[12] The failure to tender immunity was the critical missing element which invalidated the discharges of the policeman in *Gardner* v. *Broderick*, 392 U. S. 273, and the sanitation men in *Sanitation Men* v. *Sanitation Comm'r*, 392 U. S. 280, 284–285:

"If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity* v. *New Jersey*, *supra*, the privilege against self-incrimination would not have been a bar to his dismissal." *Gardner* v. *Broderick*, *supra*, at 278.

I recognize that *Gardner* v. *Broderick* and *Garrity* v. *New Jersey*, 385 U. S. 493, make it clear that law enforcement officers are indistinguishable from other government employees as far as the privilege against compulsory self-incrimination is concerned. In view of the large measure of state power and public trust we grant our police, I am not sure that I would have joined those decisions. But extension of the largest measure of the Fifth Amendment privilege to the police does not require its further extension to this case. See *supra*, at 812 (text to n. 7).

But the availability of that alternative does not require us to conclude that our highest public officers may refuse to respond to legitimate inquiries and remain in office unless they are first granted immunity from criminal prosecution. The Fifth Amendment does not require the State to pay such a price to effect the removal of an officer whose claim of privilege can only erode the public's confidence in its government.

The New York statute, if enforced, will require the state chairman to make a choice between silence and public service. Appellee was on notice on this possibility when he accepted his offices.[13] He has an unquestioned constitutional right to choose either alternative. The choice may indeed be a difficult one for him to make. In constitutional terms, however, I see no difference between his choice and that confronted by many other public-spirited citizens who are at once asked to serve their country and to respond publicly to any suggestion of wrongdoing that may be advanced by any hostile or curious witness. The fact that such a choice may be difficult is not a reason for saying that the State has no power to require an officeholder or officeseeker to make it.

I respectfully dissent.

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[13] Section 22 was enacted in 1949, years before appellee gained his chairmanships.

SMITH, ADMINISTRATOR, NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, ET AL. *v.* ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY & REFORM ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 76–180. Argued March 21, 1977—Decided June 13, 1977*

In this litigation appellees, individual foster parents and a foster parents organization, sought declaratory and injunctive relief against New York State and New York City officials, alleging that the statutory and regulatory procedures for removal of foster children from foster homes violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Under the New York Social Services Law the authorized placement agency has discretion to remove the child from the foster home, and regulations provide for 10 days' advance notice of removal. Objecting foster parents may request a conference with the Social Services Department where the foster parent may appear with counsel to be advised of the reasons for removal and to submit opposing reasons. Within five days after the conference the agency official must render a written decision and send notice to the foster parent and agency. If the child is removed after the conference the foster parent may appeal to the Department of Social Services, where a full adversary administrative hearing takes place, and the resultant determination is subject to judicial review. Removal is not stayed pending the hearing and judicial review. New York City provides additional procedures (SSC Procedure No. 5) to the foregoing statewide scheme, under which in lieu of or in addition to the conference the foster parents are entitled to a full trial-type preremoval hearing if the child is being transferred to another foster home. An additional statewide procedure is provided by N. Y. Soc. Serv. Law § 392 whereby a foster parent may obtain preremoval judicial review of an agency

*Together with No. 76–183, *Shapiro, Executive Director, New York State Board of Social Welfare, et al.* v. *Organization of Foster Families for Equality & Reform et al.*; No. 76–5193, *Rodriguez et al.* v. *Organization of Foster Families for Equality & Reform et al.*; and No. 76–5200, *Gandy et al.* v. *Organization of Foster Families for Equality & Reform et al.*, also on appeal from the same court.

decision to remove a child who has been in foster care for 18 months or more. The District Court held that the State's preremoval procedures are constitutionally defective and that "before a foster child can be peremptorily transferred . . . to another foster home or to the natural parents . . . he is entitled to [an administrative] hearing at which all concerned parties may present any relevant information . . . ." Such a hearing would be held automatically, and before an officer free from contact with the removal decision who could order that the child remain with the foster parents. Appellees contended that when a child has lived in a foster home for a year or more a psychological tie is created between the child and the foster parents that constitutes the foster family the child's "psychological family," giving the family a "liberty interest" in its survival as a unit that is protected by the Fourteenth Amendment. The District Court, avoiding the "novel" question of whether the foster home is entitled to the same constitutional deference as the biological family, held that the foster child had an independent right to be heard before being condemned to suffer "grievous loss." *Held:*

1. The District Court erred in finding that the "grievous loss" to the foster child resulting from an improvident removal decision implicated the due process guarantee, as the determining factor is the nature of the interest involved rather than its weight. *Meachum* v. *Fano*, 427 U. S. 215, 224; *Board of Regents* v. *Roth*, 408 U. S. 564, 570–571. Pp. 840–841.

2. The challenged procedures are constitutionally adequate even were it to be assumed that appellees have a protected "liberty interest" under the Fourteenth Amendment. The procedures employed by the State and New York City satisfy the standards for determining the sufficiency of procedural protections, taking into consideration the factors enumerated in *Mathews* v. *Eldridge*, 424 U. S. 319, 335: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Pp. 847–856.

418 F. Supp. 277, reversed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. STEWART, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 856.

Maria L. Marcus, Assistant Attorney General of New York, argued the cause for appellants in Nos. 76–180 and 76–183. With her on the briefs for appellants in No. 76–183 were *Louis J. Lefkowitz*, Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Mark C. Rutzick*, Assistant Attorney General. *W. Bernard Richland*, *Leonard Koerner*, and *Elliot P. Hoffman* filed briefs for appellants in No. 76–180. *Louise Gruner Gans* argued the cause for appellants in No. 76–5193. With her on the brief was *Marttie L. Thompson*. *Helen L. Buttenwieser* argued the cause for appellants in No. 76–5200. With her on the briefs was *Ephraim London*.

Marcia Robinson Lowry argued the cause for appellees in all cases. With her on the brief were *Rena K. Uviller* and *Martin Guggenheim*.†

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellees, individual foster parents [1] and an organization of foster parents, brought this civil rights class action pursuant to 42 U. S. C. § 1983 in the United States District Court for

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†*Paul Piersma* filed a brief for the National Juvenile Law Center as *amicus curiae* urging reversal.

Joseph Goldstein, *Sonja Goldstein*, *Robert A. Burt*, *Paul D. Gewirtz*, and *Stephen Wizner* filed a brief for A Group of Concerned Persons for Children as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed by *William B. Haley* for the Community Service Society of New York; by *Michael J. Dale*, *Gene B. Mechanic*, and *Carol Sherman* for the Legal Aid Society of New York City, Juvenile Rights Division; and by *Herbert Teitelbaum* for the Puerto Rican Family Institute, Inc., et al.

[1] Appellee Madeleine Smith is the foster parent with whom Eric and Danielle Gandy have been placed since 1970. The Gandy children, who are now 12 and 9 years old respectively, were voluntarily placed in foster care by their natural mother in 1968, and have had no contact with her at least since being placed with Mrs. Smith. The foster-care agency has sought to remove the children from Mrs. Smith's care because her arthritis, in the agency's judgment, makes it difficult for her to continue to pro-

the Southern District of New York, on their own behalf and on behalf of children for whom they have provided homes for a year or more. They sought declaratory and injunctive relief against New York State and New York City officials,[2]

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vide adequate care. A foster-care review proceeding under N. Y. Soc. Serv. Law § 392 (McKinney 1976), see *infra*, at 831–832, resulted in an order, subsequent to the decision of the District Court, directing that foster care be continued and apparently contemplating, though not specifically ordering, that the children will remain in Mrs. Smith's care. *In re Gandy*, Nos. K–2663/74S, K–2664/74S (Fam. Ct. N. Y. Cty., Nov. 22, 1976).

Appellees Ralph and Christiane Goldberg were the foster parents of Rafael Serrano, now 14. His parents placed him in foster care voluntarily in 1969 after an abuse complaint was filed against them. It is alleged that the agency supervising the placement had informally indicated to Mr. and Mrs. Goldberg that it intended to transfer Rafael to the home of his aunt in contemplation of permanent placement. This effort has apparently failed. A petition for foster-care review under Soc. Serv. Law § 392 filed by the agency alleges that the Goldbergs are now separated, Mrs. Goldberg having moved out of the house, taking her own child but leaving Rafael. The child is now in a residential treatment center, where Mr. Goldberg continues to visit him. App. to Reply Brief for Appellants in No. 76–180.

Appellees Walter and Dorothy Lhotan were foster parents of the four Wallace sisters, who were voluntarily placed in foster care by their mother in 1970. The two older girls were placed with the Lhotans in that year, their two younger sisters in 1972. In June 1974, the Lhotans were informed that the agency had decided to return the two younger girls to their mother and transfer the two older girls to another foster home. The agency apparently felt that the Lhotans were too emotionally involved with the girls and were damaging the agency's efforts to prepare them to return to their mother. The state courts have ordered that all the Wallace children be returned to their mother, *State ex rel. Wallace* v. *Lhotan*, 51 App. Div. 2d 252, 380 N. Y. S. 2d 250, appeal dismissed and leave to appeal denied, 39 N. Y. 2d 705 (1976). We are told that the children have been returned and are adjusting successfully. Reply Brief for Appellants in No. 76–5200, pp. 1a–10a.

[2] Defendants in the District Court included various New York State and New York City child welfare officials, and officials of a voluntary child-care agency and the Nassau County Department of Social Services. The latter two defendants have not appealed.

alleging that the procedures governing the removal of foster children from foster homes provided in N. Y. Soc. Serv. Law §§ 383 (2) and 400 (McKinney 1976), and in 18 N. Y. C. R. R. § 450.14 (1974) violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[3] The District

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[3] New York Soc. Serv. Law § 383 (2) (McKinney 1976) provides:

"The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded."

New York Soc. Serv. Law § 400 (McKinney 1976) provides:

"Removal of children

"1. When any child shall have been placed in an institution or in a family home by a commissioner of public welfare or a city public welfare officer, the commissioner or city public welfare officer may remove such child from such institution or family home and make such disposition of such child as is provided by law.

"2. Any person aggrieved by such decision of the commissioner of public welfare or city welfare officer may appeal to the department, which upon receipt of the appeal shall review the case, shall give the person making the appeal an opportunity for a fair hearing thereon and within thirty days render its decision. The department may also, on its own motions, review any such decision made by the public welfare official. The department may make such additional investigation as it may deem necessary. All decisions of the department shall be binding upon the public welfare district involved and shall be complied with by the public welfare officials thereof."

Title 18 N. Y. C. R. R. § 450.14, which was renumbered § 450.10 as of September 18, 1974, provides:

"Removal from foster family care. (a) Whenever a social services official of another authorized agency acting on his behalf proposes to remove a child in foster family care from the foster family home, he or such other authorized agency, as may be appropriate, shall notify the foster family parents, in writing of the intention to remove such child at least 10 days prior to the proposed effective date of such removal, except where the health or safety of the child requires that he be removed immediately from the foster family home. Such notification shall further

Court appointed independent counsel for the foster children to forestall any possibility of conflict between their interests and the interests asserted by the foster parents.[4] A group of

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advise the foster family parents that they may request a conference with the social services official or a designated employee of his social services department at which time they may appear, with or without a representative to have the proposed action reviewed, be advised of the reasons therefor and be afforded an opportunity to submit reasons why the child should not be removed. Each social services official shall instruct and require any authorized agency acting on his behalf to furnish notice in accordance with the provisions of this section. Foster parents who do not object to the removal of the child from their home may waive in writing their right to the 10 day notice, provided, however, that such waiver shall not be executed prior to the social services official's determination to remove the child from the foster home and notifying the foster parents thereof.

"(b) Upon the receipt of a request for such conference, the social services official shall set a time and place for such conference to be held within 10 days of receipt of such request and shall send written notice of such conference to the foster family parents and their representative, if any, and to the authorized agency, if any, at least five days prior to the date of such conference.

"(c) The social services official shall render and issue his decision as expeditiously as possible but not later than five days after the conference and shall send a written notice of his decision to the foster family parents and their representative, if any, and to the authorized agency, if any. Such decision shall advise the foster family parents of their right to appeal to the department and request a fair hearing in accordance with section 400 of the Social Services Law.

"(d) In the event there is a request for a conference, the child shall not be removed from the foster family home until at least three days after the notice of decision is sent, or prior to the proposed effective date of removal, whichever occurs later.

"(e) In any agreement for foster care between a social services official or another authorized agency acting on his behalf and foster parents, there shall be contained therein a statement of a foster parent's rights provided under this section."

[4] Joint App. to Jurisdictional Statements 54a. See *Organization of Foster Families* v. *Dumpson*, 418 F. Supp. 277, 278 (SDNY 1976).

natural mothers of children in foster care [5] were granted leave to intervene [6] on behalf of themselves and others similarly situated.[7]

A divided three-judge District Court concluded that "the pre-removal procedures presently employed by the State are constitutionally defective," holding that "before a foster child can be peremptorily transferred from the foster home in which he has been living, be it to another foster home or to the natural parents who initially placed him in foster care, he is entitled to a hearing at which all concerned parties may present any relevant information to the administrative decisionmaker charged with determining the future placement of the child," *Organization of Foster Families* v. *Dumpson*, 418 F. Supp. 277, 282 (1976). Four appeals to this Court were taken from the ensuing judgment declaring the challenged statutes unconstitutional and permanently enjoining their

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[5] Intervenor Naomi Rodriguez, who is blind, placed her newborn son Edwin in foster care in 1973 because of marital difficulties. When Mrs. Rodriguez separated from her husband three months later, she sought return of her child. Her efforts over the next nine months to obtain return of the child were resisted by the agency, apparently because it felt her handicap prevented her from providing adequate care. Eventually, she sought return of her child in the state courts, and finally prevailed, three years after she first sought return of the child. *Rodriguez* v. *Dumpson*, 52 App. Div. 2d 299, 383 N. Y. S. 2d 833 (1976). The other named intervenors describe similar instances of voluntary placements during family emergencies followed by lengthy and frustrating attempts to get their children back.

[6] The intervening natural parents argue in this Court that the District Court erred in not permitting them to raise certain defenses. In view of our disposition of the case, we find it unnecessary to reach this issue.

[7] In an opinion handed down at the same time as its decision on the merits, the District Court granted class certification to appellee foster parents, the named children, and the intervening natural parents. Joint App. to Jurisdictional Statements 42a. See *Organization of Foster Families* v. *Dumpson*, *supra*, at 278 n. 3. Appellants in No. 76-5193 challenge the class certification of the children. We perceive no error.

enforcement. The New York City officials are appellants in No. 76–180. The New York State officials are appellants in No. 76–183. Independent counsel appointed for the foster children appeals on their behalf in No. 76–5200. The intervening natural mothers are appellants in No. 76–5193. We noted probable jurisdiction of the four appeals. 429 U. S. 883 (1976). We reverse.

I

A detailed outline of the New York statutory system regulating foster care is a necessary preface to a discussion of the constitutional questions presented.

A

The expressed central policy of the New York system is that "it is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home, and . . . parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered," Soc. Serv. Law § 384–b (1)(a)(ii) (McKinney Supp. 1976–1977). But the State has opted for foster care as one response to those situations where the natural parents are unable to provide the "positive, nurturing family relationships" and "normal family life in a permanent home" that offer "the best opportunity for children to develop and thrive." §§ 384–b (1)(b), (1)(a)(i).

Foster care has been defined as "[a] child welfare service which provides substitute family care for a planned period for a child when his own family cannot care for him for a temporary or extended period, and when adoption is neither desirable nor possible." Child Welfare League of America, Standards for Foster Family Care Service 5 (1959).[8] Thus,

[8] The term "foster care" is often used more generally to apply to any type of care that substitutes others for the natural parent in the parental

the distinctive features of foster care are, first, "that it is care in a *family*, it is noninstitutional substitute care," and, second, "that it is for a *planned* period—either temporary or extended. This is unlike adoptive placement, which implies a *permanent* substitution of one home for another." Kadushin 355.

Under the New York scheme children may be placed in foster care either by voluntary placement or by court order. Most foster-care placements are voluntary.[9] They occur when physical or mental illness, economic problems, or other family crises make it impossible for natural parents, particularly single parents, to provide a stable home life for their children for some limited period.[10] Resort to such placements

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role, including group homes, adoptive homes, and institutions, as well as foster family homes. A. Kadushin, Child Welfare Services 355 (1967) (hereafter Kadushin). Cf. Mnookin, Foster Care—In Whose Best Interests?, 43 Harv. Educ. Rev. 599, 600 (1973) (hereafter Mnookin I). Since this case is only concerned with children in foster family homes, the term will generally be used here in the more restricted sense defined in the text.

[9] The record indicates that as many as 80% of the children in foster care in New York City are voluntarily placed. Deposition of Prof. David Fanshel, App. 178a. But cf. Child Welfare Information Services, Characteristics of Children in Foster Care, New York City Reports, Table No. 11 (Dec. 31, 1976). Other studies from New York and elsewhere variously estimate the percentage of voluntary placements between 50% and 90%. See, *e. g.*, Mnookin I 601; Areen, Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases, 63 Geo. L. J. 887, 921–922, and n. 185 (1975); Levine, Caveat Parens: A Demystification of the Child Protection System, 35 U. Pitt. L. Rev. 1, 29 (1973).

[10] Experienced commentators have suggested that typical parents in this situation might be "[a] divorced parent in a financial bind, an unwed adolescent mother still too immature to rear a child, or a welfare mother confronted with hospitalization and therefore temporarily incapable of caring for her child." Weiss & Chase, The Case for Repeal of Section 383 of the New York Social Services Law, 4 Colum. Human Rights L. Rev. 325, 326 (1972). A leading text on child-care services suggests that "[f]amily disruption, marginal economic circumstances, and poor health"

is almost compelled when it is not possible in such circumstance to place the child with a relative or friend, or to pay for the services of a homemaker or boarding school.

Voluntary placement requires the signing of a written agreement by the natural parent or guardian, transferring the care and custody of the child to an authorized child welfare agency.[11] N. Y. Soc. Serv. Law § 384–a (1) (McKinney Supp. 1976–1977). Although by statute the terms of such agreements are open to negotiation, § 384–a (2)(a), it is contended that agencies require execution of standardized forms. Brief for Appellants in No. 76–5193, p. 25 n. 17. See App. 63a–64a, 65a–67a. The agreement may provide for return of the child to the natural parent at a specified date or upon occurrence of a particular event, and if it does not, the child must be returned by the agency, in the absence of a court order, within 20 days of notice from the parent. § 384–a (2)(a).[12]

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are principal factors leading to placement of children in foster care. Kadushin 366. Other studies suggest, however, that neglect, abuse, abandonment and exploitation of children, which presumably account for most of the children who enter foster care by court order, see *infra*, at 828, are also involved in many cases of voluntary placement. See *infra*, at 834; Kadushin 366.

[11] "Authorized agency" is defined in N. Y. Soc. Serv. Law § 371 (10) (McKinney 1976) and "includes any local public welfare children's bureau, such as the defendants New York City Bureau of Child Welfare and Nassau County Children's Bureau, and any voluntary child-care agency under the supervision of the New York State Board of Social Welfare, such as the defendant Catholic Guardian Society of New York." 418 F. Supp., at 278 n. 5.

An *amicus curiae* brief states that in New York City, 85% of the children in foster care are placed with voluntary child-care agencies licensed by the State, while most children in foster care outside New York City are placed directly with the local Department of Social Services. Brief for Legal Aid Society of City of New York, Juvenile Rights Division, as *Amicus Curiae* 14 n. 22.

[12] Before enactment of § 384–a in 1975, the natural parent who had voluntarily placed a child in foster care had no automatic right to return

The agency may maintain the child in an institutional setting, §§ 374–b, 374–c, 374–d (McKinney 1976), but more commonly acts under its authority to "place out and board out" children in foster homes. § 374 (1).[13] Foster parents, who are licensed by the State or an authorized foster-care agency, §§ 376, 377, provide care under a contractual arrangement with the agency, and are compensated for their services. See 18 N. Y. C. R. R. §§ 606.2, 606.6 (1977); App. 76a, 81a. The typical contract expressly reserves the right of the agency to remove the child on request. 418 F. Supp., at 281; App. 76a, 79a. See N. Y. Soc. Serv. Law § 383 (2) (McKinney 1976).[14] Conversely, the foster parent may cancel the agreement at will.[15]

The New York system divides parental functions among agency, foster parents, and natural parents, and the definitions of the respective roles are often complex and often unclear.[16]

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of the child. If the agency refused consent for the return of the child to the parent, the parent's only remedy was to seek a writ of habeas corpus. N. Y. Civ. Prac. Law § 7001 *et seq.* (McKinney 1963); N. Y. Family Court Act § 651 (McKinney 1975). When the parent did not invoke this remedy, the child would remain in foster care. See Weiss & Chase, *supra*, n. 10, at 326–327, 333–334.

[13] The record indicates that at the end of 1973, of 48,812 children in foster care under the supervision of the New York State Board of Social Welfare and the New York State Department of Social Services, 35,287 (about 72%) were placed in foster family homes, and the rest in institutions or other facilities. App. 117a.

[14] Such contractual provisions are apparently also characteristic of foster-care arrangements in other States. See, *e. g.*, Mnookin I 610.

[15] See, *e. g.*, the case of appellees Ralph and Christiane Goldberg, n. 1, *supra*. Evidence in the record indicates that as many as one-third of all transfers within the foster-care system are at the request of the foster parents. Affidavit of Carol J. Parry, App. 90a.

[16] The resulting confusion not only produces anomalous legal relationships but also affects the child's emotional status. The foster child's loyalties, emotional involvements, and responsibilities are often divided among three adult authority figures—the natural parents, the foster parent, and the social worker representing the foster-care agency. See,

The law transfers "care and custody" to the agency, § 384–a; see also § 383 (2), but day-to-day supervision of the child and his activities, and most of the functions ordinarily associated with legal custody, are the responsibility of the foster parent.[17] Nevertheless, agency supervision of the performance of the foster parents takes forms indicating that the foster parent does not have the full authority of a legal custodian.[18] Moreover, the natural parent's placement of the child with the agency does not surrender legal guardianship;[19] the parent

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e. g., Kadushin 387–389; see also Mnookin I 624; Wald, State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 623, 645 (1976) (hereafter Wald); E. Weinstein, The Self-Image of the Foster Child 15 (1960).

[17] "Legal custody is concerned with the rights and duties of the person (usually the parent) having custody to provide for the child's daily needs—to feed him, clothe him, provide shelter, put him to bed, send him to school, see that he washes his face and brushes his teeth." Kadushin 354–355. Obviously, performance of these functions directly by a state agency is impractical.

[18] "The agency sets limits and advances directives as to how the foster parents are to behave toward the child—a situation not normally encountered by natural parents. The shared control and responsibility for the child is clearly set forth in the instruction pamphlets issued to foster parents." *Id.*, at 394. Agencies frequently prohibit corporal punishment; require that children over a certain age be given an allowance; forbid changes in the child's sleeping arrangements or vacations out of State without agency approval; require the foster parent to discuss the child's behavioral problems with the agency. *Id.*, at 394–395. Furthermore, since the cost of supporting the child is borne by the agency, the responsibility, as well as the authority, of the foster parent is shared with the agency. *Ibid.*

[19] Voluntary placement in foster care is entirely distinct from the "surrender" of both "the guardianship of the person and the custody" of a child under Soc. Serv. Law § 384, which frees the child for adoption. § 384 (2). "Adoption is the legal proceeding whereby a person takes another person into the legal relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect of such other

retains authority to act with respect to the child in certain circumstances.[20] The natural parent has not only the right but the obligation to visit the foster child and plan for his future; failure of a parent with capacity to fulfill the obligation for more than a year can result in a court order terminating the parent's rights on the ground of neglect. §§ 384–b (4), (7). See also § 384–b (5); N. Y. Dom. Rel. Law § 111 (McKinney Supp. 1976–1977); N. Y. Family Court Act § 611 (McKinney Supp. 1976–1977).[21]

Children may also enter foster care by court order. The Family Court may order that a child be placed in the custody of an authorized child-care agency after a full adversary judicial hearing under Art. 10 of the New York Family Court Act, if it is found that the child has been abused or neglected by his natural parents. §§ 1052, 1055. In addition, a minor adjudicated a juvenile delinquent, or "person in need of supervision" may be placed by the court with an agency. §§ 753, 754, 756. The consequences of foster-care placement by court order do not differ substantially from those for children voluntarily placed, except that the parent is not entitled to return of the child on demand pursuant to Soc. Serv. Law § 384–a (2) (a); termination of foster care must then be consented to by the court. § 383 (1).[22]

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person." N. Y. Dom. Rel. Law § 110 (McKinney 1964). A child may also be freed for adoption by abandonment or consent. § 111 (McKinney Supp. 1976–1977); Soc. Serv. Law § 384–b.

[20] "[A]lthough the agency usually obtains legal custody in foster family care, the child still legally 'belongs' to the parent and the parent retains guardianship. This means that, for some crucial aspects of the child's life, the agency has no authority to act. Only the parent can consent to surgery for the child, or consent to his marriage, or permit his enlistment in the armed forces, or represent him at law." Kadushin 355. But see Soc. Serv. Law § 383–b.

[21] The agreement transferring custody to the agency must inform the parent of these obligations. §§ 384–a (2) (c) (iii), (iv).

[22] The Family Court is also empowered permanently to sever the ties

B

The provisions of the scheme specifically at issue in this litigation come into play when the agency having legal custody determines to remove the foster child from the foster home, either because it has determined that it would be in the child's best interests to transfer him to some other foster home, or to return the child to his natural parents in accordance with the statute or placement agreement. Most children are removed in order to be transferred to another foster home.[23] The procedures by which foster parents may challenge a removal made for that purpose differ somewhat from those where the removal is made to return the child to his natural parent.

Section 383 (2), n. 3, *supra*, provides that the "authorized agency placing out or boarding [a foster] child . . . may in its discretion remove such child from the home where placed or boarded." Administrative regulations implement this provision. The agency is required, except in emergencies, to notify the foster parents in writing 10 days in advance of any removal. 18 N. Y. C. R. R. § 450.10 (a) (1976).[24] The notice advises the foster parents that if they object to the child's removal they may request a "conference" with the Social Services Department. *Ibid.* The department schedules requested conferences within 10 days of the receipt of the request. § 450.10 (b). The foster parent may appear with counsel at the conference, where he will "be advised of the

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of parent and child if the parent fails to maintain contact with the child while in foster care. § 384-b (4)–(7). See *supra*, at 828, and n. 21.

[23] The record shows that in 1973–1974 approximately 80% of the children removed from foster homes in New York State after living in the foster home for one year or more were transferred to another foster placement. Thirteen percent were returned to the biological parents, and 7% were adopted. Tr. of Oral Arg. 34; Brief for Appellees 20.

[24] This regulation, set out in full in n. 3, *supra*, was formerly numbered 18 N. Y. C. R. R. § 450.14, and is referred to by that number in the opinion of the District Court.

reasons [for the removal of the child] and be afforded an opportunity to submit reasons why the child should not be removed." § 450.10 (a).[25] The official must render a decision in writing within five days after the close of the conference, and send notice of his decision to the foster parents and the agency. § 450.10 (c). The proposed removal is stayed pending the outcome of the conference. § 450.10 (d).

If the child is removed after the conference, the foster parent may appeal to the Department of Social Services for a "fair hearing," that is, a full adversary administrative hearing, under Soc. Serv. Law § 400,[26] the determination of which is subject to judicial review under N. Y. Civ. Prac. Law § 7801 *et seq.* (McKinney 1963); however, the removal is not automatically stayed pending the hearing and judicial review.[27]

This statutory and regulatory scheme applies statewide.[28]

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[25] The State argues that while § 450.10 provides minimum requirements for notice to the foster family of the agency's intention to remove the child and the reasons for that decision, the close contact between the agency and the foster parent insures that in most circumstances the foster parent is informed well in advance of any projected removal. In fact, 18 N. Y. C. R. R. § 606.16 (1976) requires the agency in some circumstances to begin for the discharge of the children from foster care, in cooperation with all parties involved, as early as six months in advance. Brief for Appellants in No. 76–183, pp. 21–23.

[26] This statute is set out in full in n. 3, *supra*.

[27] A court, however, apparently may grant a stay in some circumstances. See, *e. g.*, *In re W.*, 77 Misc. 2d 374, 377, 355 N. Y. S. 2d 245, 249 (1974).

[28] There is some dispute whether the procedures set out in 18 N. Y. C. R. R. § 450.10 and Soc. Serv. Law § 400 apply in the case of a foster child being removed from his foster home to be returned to his natural parents. Application of these procedures to children who have been placed voluntarily, for example, arguably conflicts with the requirement of § 384–a (2) (a) that children in that situation be returned to the natural parent as provided in the placement agreement or within 20 days of demand. Similarly, if the child has been ordered returned by a court, it is unclear what purpose could be served by an administrative conference or hearing on the correctness of the decision to remove the child

In addition, regulations promulgated by the New York City Human Resources Administration, Department of Social Services—Special Services for Children (SSC) provide even greater procedural safeguards there. Under SSC Procedure No. 5 (Aug. 5, 1974), in place of or in addition to the conference provided by the state regulations, the foster parents may request a full trial-type hearing *before* the child is removed from their home. This procedure applies, however, only if the child is being transferred to another foster home, and not if the child is being returned to his natural parents.[29]

One further preremoval procedural safeguard is available. Under Soc. Serv. Law § 392, the Family Court has jurisdiction to review, on petition of the foster parent or the agency, the status of any child who has been in foster care for 18 months or longer.[30] The foster parents, the natural parents, and all

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from the foster home. Moreover, since the § 400 hearing takes place after removal of the child from the foster home, the hearing would have no purpose if the child has been returned to its parents, since the agency apparently has no authority to take the child back from its parents against their will without court intervention.

Nevertheless, nothing in either the statute or the regulations limits the availability of these procedures to transfers within the foster-care system. Each refers to the decision to *remove* a child from the foster family home, and thus on its face each would seem to cover removal for the purpose of returning the child to its parents. Furthermore, it is undisputed on this record that the actual administrative practice in New York is to provide the conference and hearing in all cases where they are requested, regardless of the destination of the child. In the absence of authoritative state-court interpretation to the contrary, we therefore assume that these procedures are available whenever a child is removed from a foster family home.

[29] SSC Procedure No. 5 is set out in full in App. to Brief for Appellants in No. 76–5193, pp. 54a–65a, and in Jurisdictional Statement of New York City Appellants A8.

[30] The agency is required to initiate such a review when a child has remained in foster care for 18 months, § 392 (2)(a), and if the child remains in foster care, the court "shall rehear the matter whenever it

interested agencies are made parties to the proceeding. § 392 (4). After hearing, the court may order that foster care be continued, or that the child be returned to his natural parents, or that the agency take steps to free the child for adoption.[31] § 392 (7). Moreover, § 392 (8) authorizes the court to issue an "order of protection" which "may set forth reasonable conditions of behavior to be observed for a specified time by a person or agency who is before the court." Thus, the court may order not only that foster care be continued, but additionally, "in assistance or as a condition of" that order, that the agency leave the child with the present foster parent.[32] In other words, § 392 provides a mechanism whereby a foster parent may obtain preremoval judicial review of an agency's decision to remove a child who has been in foster care for 18 months or more.

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deems necessary or desirable, or upon petition by any party entitled to notice in proceedings under this section, but at least every twenty-four months." § 392 (10).

[31] If the agency already has guardianship as well as custody of the foster child, as in the case of a surrender or previous court order terminating the guardianship of the natural parent for neglect, see nn. 19, 22, *supra*, the court may simply order that the child be placed for adoption, § 392 (7)(d); if the agency does not have guardianship, as in the case of children placed in foster care temporarily either by court order or by voluntary placement, the court may direct the agency to initiate a proceeding to free the child for adoption under §§ 384–b, 392 (7)(c).

[32] Both the District Court, 418 F. Supp., at 284, and the appellees, Brief for Appellees 70–72, argue that § 392 does not permit the court to enter such an order, citing *In re W.*, *supra*, at 376, 355 N. Y. S. 2d, at 248. But in that very case, the court ordered that the child remain with the foster family pending exhaustion of the remedies provided by § 400, thus essentially converting that hearing into a preremoval remedy. See n. 27, *supra*. Moreover, other courts have granted such relief. *In re S.*, 74 Misc. 2d 935, 347 N. Y. S. 2d 274 (1973). See also *In re Denlow*, 87 Misc. 2d 410, 384 N. Y. S. 2d 621 (1976); *In re H.*, 80 Misc. 2d 593, 363 N. Y. S. 2d 73 (1974). This interpretation of the power of the court seems to be fully supported by the broad language of § 392 (7).

C

Foster care of children is a sensitive and emotion-laden subject, and foster-care programs consequently stir strong controversy. The New York regulatory scheme is no exception. New York would have us view the scheme as described in its brief:

> "Today New York premises its foster care system on the accepted principle that the placement of a child into foster care is solely a temporary, transitional action intended to lead to the future reunion of the child with his natural parent or parents, or if such a reunion is not possible, to legal adoption and the establishment of a new permanent home for the child." Brief for Appellants in No. 76–183, p. 3.

Some of the parties and *amici* argue that this is a misleadingly idealized picture. They contend that a very different perspective is revealed by the empirical criticism of the system presented in the record of this case and confirmed by published studies of foster care.

From the standpoint of natural parents, such as the appellant intervenors here, foster care has been condemned as a class-based intrusion into the family life of the poor. See, *e. g.*, Jenkins, Child Welfare as a Class System, in Children and Decent People 3 (A. Schorr ed. 1974). And see generally tenBroek, California's Dual System of Family Law: Its Origins, Development and Present Status (pt. I), 16 Stan. L. Rev. 257 (1964); (pt. II), 16 Stan. L. Rev. 900 (1964); (pt. III), 17 Stan. L. Rev. 614 (1965). It is certainly true that the poor resort to foster care more often than other citizens. For example, over 50% of all children in foster care in New York City are from female-headed families receiving Aid to Families with Dependent Children. Foundation for Child Development, State of the Child: New York City 61 (1976). Minority families are also more likely to turn to fos-

ter care; 52.3% of the children in foster care in New York City are black and 25.5% are Puerto Rican. Child Welfare Information Services, Characteristics of Children in Foster Care, New York City Reports, Table No. 2 (Dec. 31, 1976).[33] This disproportionate resort to foster care by the poor and victims of discrimination doubtless reflects in part the greater likelihood of disruption of poverty-stricken families. Commentators have also noted, however, that middle- and upper-income families who need temporary care services for their children have the resources to purchase private care. See, *e. g.*, Rein, Nutt, & Weiss 24, 25. The poor have little choice but to submit to state-supervised child care when family crises strike. *Id.*, at 34.

The extent to which supposedly "voluntary" placements are in fact voluntary has been questioned on other grounds as well. For example, it has been said that many "voluntary" placements are in fact coerced by threat of neglect proceedings[34] and are not in fact voluntary in the sense of the product of an informed consent. Mnookin I 599, 601. Studies also suggest that social workers of middle-class backgrounds, perhaps unconsciously, incline to favor continued placement in foster care with a generally higher-status family rather than return the child to his natural family, thus reflecting a bias that treats the natural parents' poverty and lifestyle as prejudicial to the best interests of the child. Rein, Nutt, & Weiss 42–44; Levine, Caveat Parens: A Demystification of the Child Protection System, 35 U. Pitt. L. Rev. 1, 29 (1973). This accounts,[35] it has been said, for the hostility of agencies to the

[33] For further comment on this point, see Jenkins, Child Welfare as a Class System, in Children and Decent People 3, 11–12 (A. Schorr ed. 1974); Rein, Nutt, & Weiss, Foster Family Care: Myth and Reality, in Children and Decent People 24, 25–29 (A. Schorr ed. 1974) (hereafter Rein, Nutt, & Weiss).

[34] See, *e. g.*, the case of Rafael Serrano, the foster child of appellees Ralph and Christiane Goldberg, n. 1, *supra*.

[35] Other factors alleged to bias agencies in favor of retention in foster

efforts of natural parents to obtain the return of their children.[36]

Appellee foster parents as well as natural parents question the accuracy of the idealized picture portrayed by New York. They note that children often stay in "temporary" foster care for much longer than contemplated by the theory of the system. See, *e. g.*, Kadushin 411–412; Mnookin I 610–613; Wald 662–663; Rein, Nutt, & Weiss 37–39.[37] The

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care are the lack of sufficient staff to provide social work services needed by the natural parents to resolve their problems and prepare for return of the child; policies of many agencies to discourage involvement of the natural parents in the care of the child while in foster care; and systems of foster-care funding that encourage agencies to keep the child in foster care. Wald 677–679. See also E. Sherman, R. Neuman, & A. Shyne, Children Adrift in Foster Care: A Study of Alternative Approaches 4–5 (1973).

[36] For an example of this problem, see the case of intervenor Naomi Rodriguez, n. 5, *supra*.

Recent legislative reforms in New York that decrease agencies' discretion to retain a child in foster care are apparently designed to meet these objections. For example, Soc. Serv. Law § 384–a (2)(a) gives parents of children in voluntary foster placement greater rights to the return of their children. Since the statute permits placement agreements of varied terms, however, and since many children in foster care are not voluntarily placed, there may still be situations in which the agency has considerable discretion in deciding whether or not to return the child to the natural parent. The periodic court review provided by § 392 is also intended in part to meet these objections, but critics of foster care have argued that given the heavy caseloads, such review may often be perfunctory. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 (3) Law & Contemp. Probs. 226, 274–275 (1975) (hereafter Mnookin II). Moreover, judges too may find it difficult, in utilizing vague standards like "the best interests of the child," to avoid decisions resting on subjective values.

[37] The New York Legislature has recognized the merit of this criticism. Social Serv. Law § 384–b (1)(b), adopted in 1976, states:

"The legislature further finds that many children who have been placed in foster care experience unnecessarily protracted stays in such care without

District Court found as a fact that the median time spent in foster care in New York was over four years. 418 F. Supp., at 281. Indeed, many children apparently remain in this "limbo" indefinitely. Mnookin II 226, 273. The District Court also found that the longer a child remains in foster care, the more likely it is that he will never leave: "[T]he probability of a foster child being returned to his biological parents declined markedly after the first year in foster care." 418 F. Supp., at 279 n. 6. See also E. Sherman, R. Neuman, & A. Shyne, Children Adrift in Foster Care: A Study of Alternative Approaches 3 (1973); Fanshel, The Exit of Children from Foster Care: An Interim Research Report, 50 Child Welfare 65, 67 (1971). It is not surprising then that many children, particularly those that enter foster care at a very early age [38] and have little or no contact with their natural parents during extended stays in foster care,[39] often develop deep emotional ties with their foster parents.[40]

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being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens."

[38] In New York City, 23.1% of foster children enter foster care when under one year of age, and 43% at age three or under. Child Welfare Information Services, *supra*, n. 9, Table No. 5. Cf. E. Sherman, R. Neuman, & A. Shyne, *supra*, at 24 (18% of foster-care children in Rhode Island study were under one year of age when they entered foster care, and 43% were under the age of three).

[39] One study of parental contacts in New York City found that 57.4% of all foster children had had no contact with their natural parents for the previous six months. Child Welfare Information Services, Parental Visiting Information, New York City Reports, Table No. 1 (Dec. 31, 1976).

[40] The development of such ties points up an intrinsic ambiguity of foster care that is central to this case. The warmer and more homelike environment of foster care is intended to be its main advantage over institutional child care, yet because in theory foster care is intended to be only temporary, foster parents are urged not be become too attached

Yet such ties do not seem to be regarded as obstacles to transfer of the child from one foster placement to another. The record in this case indicates that nearly 60% of the children in foster care in New York City have experienced more than one placement, and about 28% have experienced three or more. App. 189a. See also Wald 645–646; Mnookin I 625–626. The intended stability of the foster-home management is further damaged by the rapid turnover among social work professionals who supervise the foster-care arrangements on behalf of the State. *Id.*, at 625; Rein, Nutt, & Weiss 41; Kadushin 420. Moreover, even when it is clear that a foster child will not be returned to his natural parents, it is rare that he achieves a stable home life through final termination of parental ties and adoption into a new permanent family. Fanshel, Status Changes of Children in Foster Care: Final

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to the children in their care. Mnookin I 613. Indeed, the New York courts have upheld removal from a foster home for the very reason that the foster parents had become too emotionally involved with the child. *In re Jewish Child Care Assn. (Sanders)*, 5 N. Y. 2d 222, 156 N. E. 2d 700 (1959). See also the case of the Lhotans, named appellees in this case, n. 1, *supra*.

On the other hand, too warm a relation between foster parent and foster child is not the only possible problem in foster care. Qualified foster parents are hard to find, Kadushin 367–372, 415–417, and very little training is provided to equip them to handle the often complicated demands of their role, Rein, Nutt, & Weiss 44–45; it is thus sometimes possible that foster homes may provide inadequate care. Indeed, situations in which foster children were mistreated or abused have been reported. Wald 645. And the social work services that are supposed to be delivered to both the natural and foster families are often limited, due to the heavy caseloads of the agencies. Kadushin 413; Mnookin II 274. Given these problems, and given that the very fact of removal from even an inadequate natural family is often traumatic for the child, Wald 644–645, it is not surprising that one commentator has found "rather persuasive, if still incomplete, evidence that throughout the United States, children in foster care are experiencing high rates of psychiatric disturbance." Eisenberg, The Sins of the Fathers: Urban Decay and Social Pathology, 32 Am. J. of Orthopsychiatry 5, 14 (1962).

Results of the Columbia University Longitudinal Study, 55 Child Welfare 143, 145, 157 (1976); Mnookin II 275–277; Mnookin I 612–613. See also n. 23, *supra*.

The parties and *amici* devote much of their discussion to these criticisms of foster care, and we present this summary in the view that some understanding of those criticisms is necessary for a full appreciation of the complex and controversial system with which this lawsuit is concerned.[41] But the issue presented by the case is a narrow one. Arguments asserting the need for reform of New York's statutory scheme are properly addressed to the New York Legislature. The relief sought in this case is entirely procedural. Our task is only to determine whether the District Court correctly held that the present procedures preceding the removal from a foster home of children resident there a year or more are constitutionally inadequate. To that task we now turn.

II

A

Our first inquiry is whether appellees have asserted interests within the Fourteenth Amendment's protection of

[41] It must be noted, however, that both appellee foster parents and intervening natural parents present incomplete pictures of the foster-care system. Although seeking relief applicable to all removal situations, the foster parents focus on intra-foster-care transfers, portraying a foster-care system in which children neglected by their parents and condemned to a permanent limbo of foster care are arbitrarily shunted about by social workers whenever they become attached to a foster home. The natural parents, who focus on foster children being returned to their parents, portray a system under which poor and minority parents, deprived of their children under hard necessity and bureaucratic pressures, are obstructed in their efforts to maintain relationships with their children and ultimately to regain custody, by hostile agencies and meddling foster parents. As the experiences of the named parties to this suit, nn. 1, 5, *supra*, and the critical studies of foster care cited, *supra*, at 833–838, demonstrate, there are elements of truth in both pictures. But neither represents the whole truth about the system.

"liberty" and "property." *Board of Regents* v. *Roth*, 408 U. S. 564, 571 (1972).

The appellees have not renewed in this Court their contention, rejected by the District Court, 418 F. Supp., at 280–281, that the realities of the foster-care system in New York gave them a justified expectation amounting to a "property" interest that their status as foster parents would be continued.[42] Our inquiry is therefore narrowed to the question whether their asserted interests are within the "liberty" protected by the Fourteenth Amendment.

The appellees' basic contention is that when a child has lived in a foster home for a year or more, a psychological tie is created between the child and the foster parents which constitutes the foster family the true "psychological family" of the child. See J. Goldstein, A. Freud, & A. Solnit, Beyond the Best Interests of the Child (1973). That family, they argue, has a "liberty interest" in its survival as a family protected by the Fourteenth Amendment. Cf. *Moore* v. *East Cleveland*, *ante*, p. 494. Upon this premise they conclude that the foster child cannot be removed without a prior hearing satisfying due process. Appointed counsel for the children, appellants in No. 76–5200, however, disagrees, and has consistently argued that the foster parents have no such liberty interest independent of the interests of the foster children, and that the best interests of the children would not be served by procedural protections beyond those already provided by New York law. The intervening natural parents of children in foster care, appellants in No. 76–5193, also oppose the foster parents, arguing that recognition of the procedural right claimed would undercut both the substantive family law of New York, which favors the return of children to their natural parents as expeditiously as possible, see *supra*, at 823,

[42] Appellees have also apparently abandoned their claim that the challenged procedures violate the Equal Protection Clause of the Fourteenth Amendment.

and their constitutionally protected right of family privacy, by forcing them to submit to a hearing and defend their rights to their children before the children could be returned to them.

The District Court did not reach appellees' contention "that the foster home is entitled to the same constitutional deference as that long granted to the more traditional biological family." 418 F. Supp., at 281. Rather than "reach[ing] out to decide such novel questions," the court based its holding that "the pre-removal procedures presently employed by the state are constitutionally defective," *id.*, at 282, not on the recognized liberty interest in family privacy, but on an independent right of the foster child "to be heard before being 'condemned to suffer grievous loss,' *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 168 . . . (1951) (Frankfurter, J., concurring)." *Ibid.*

The court apparently reached this conclusion by weighing the "harmful consequences of a precipitous and perhaps improvident decision to remove a child from his foster family," *id.*, at 283, and concluding that this disruption of the stable relationships needed by the child might constitute "grievous loss." But if this was the reasoning applied by the District Court, it must be rejected.[43] *Meachum* v. *Fano*, 427 U. S. 215, 224 (1976), is authority that such a finding does not, in and of itself, implicate the due process guarantee. What was said in *Board of Regents* v. *Roth*, *supra*, at 570–571, applies equally well here:

> "The District Court decided that procedural due process guarantees apply in this case by assessing and balancing

[43] The dissenting judge argued that the court's underlying premise was a holding "over the objection of the representative of the children . . . that the foster children have a 'liberty' interest in their relationship with the foster parents." 418 F. Supp., at 288. If this was in fact the reasoning of the District Court, we do not see how it differs from a holding that the foster family relationship is entitled to privacy protection analogous to the natural family—the issue the District Court purported not to reach.

> the weights of the particular interests involved. . . . [A] weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." [44]

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[44] Appellants argue, with the dissenting judge below, *id.*, at 288, that in any event appellee foster parents have no standing to rely upon a supposed right of the foster *children* to avoid "grievous loss," because the foster children are independently represented by court-appointed counsel, who has consistently opposed the relief requested by appellees, and denied that the children have any such right.

This argument misunderstands the peculiar circumstances of this lawsuit. Ordinarily, it is true, a party would not have standing to assert the rights of another, himself a party in the litigation; the third party himself can decide how best to protect his interests. But children usually lack the capacity to make that sort of decision, and thus their interest is ordinarily represented in litigation by parents or guardians. In this case, however, the State, the natural parents, and the foster parents, all of whom share some portion of the responsibility for guardianship of the child, see *supra*, at 826–828, and nn. 16–18, are parties, and all contend that the position they advocate is most in accord with the rights and interests of the children. In this situation, the District Court properly appointed independent counsel to represent the children, so that the court could have the benefit of an independent advocate for the welfare of the children, unprejudiced by the possibly conflicting interests and desires of the other parties. It does not follow, however, that that independent counsel, who is not a guardian *ad litem* of the children, is solely authorized to determine the children's best interest.

No party denies, or could deny, that there is an Art. III "case or controversy" between the foster parents and the defendant state officials concerning the validity of the removal procedures. Accordingly, their standing to raise the rights of the children in their attack on those procedures is a prudential question. *Craig* v. *Boren*, 429 U. S. 190, 193 (1976). We believe it would be most imprudent to leave entirely to court-appointed counsel the choices that neither the named foster children

We therefore turn to appellees' assertion that they have a constitutionally protected liberty interest—in the words of the District Court, a "right to familial privacy," 418 F. Supp., at 279—in the integrity of their family unit.[45] This assertion clearly presents difficulties.

B

It is, of course, true that "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 639–640 (1974). There does exist a "private realm of family life which the state cannot enter," *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944), that has been afforded both substantive[46] and procedural[47] protection. But is the relation of foster parent to foster child sufficiently akin to the concept of "family" recognized in our precedents to merit similar protection?[48] Although considerable difficulty has attended the task of defining "family" for purposes of the Due Process

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nor the class they represent are capable of making for themselves, especially in litigation in which all parties have sufficient attributes of guardianship that their views on the rights of the children should at least be heard.

[45] There can be, of course, no doubt of appellees' standing to assert this interest, which, to whatever extent it exists, belongs to the foster parents as much as to the foster children.

[46] *Moore* v. *East Cleveland*, *ante*, p. 494 (plurality opinion); *Roe* v. *Wade*, 410 U. S. 113, 152–153 (1973); *Wisconsin* v. *Yoder*, 406 U. S. 205, 231–233 (1972); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *id.*, at 495–496 (Goldberg, J., concurring); *id.*, at 502–503 (WHITE, J., concurring in judgment); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390, 399–401 (1923).

[47] See, *e. g.*, *Stanley* v. *Illinois*, 405 U. S. 645, 651 (1972); *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632 (1974); *Armstrong* v. *Manzo*, 380 U. S. 545 (1965); *May* v. *Anderson*, 345 U. S. 528 (1953).

[48] Of course, recognition of a liberty interest in foster families for purposes of the procedural protections of the Due Process Clause would not necessarily require that foster families be treated as fully equivalent to

Clause, see *Moore* v. *East Cleveland, ante*, pp. 494 (plurality opinion of POWELL, J.), 531 (STEWART, J., dissenting), 541 (WHITE, J., dissenting), we are not without guides to some of the elements that define the concept of "family" and contribute to its place in our society.

First, the usual understanding of "family" implies biological relationships, and most decisions treating the relation between parent and child have stressed this element. *Stanley* v. *Illinois*, 405 U. S. 645, 651 (1972), for example, spoke of "[t]he rights to conceive and to raise one's children" as essential rights, citing *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), and *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942). And *Prince* v. *Massachusetts*, stated:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 321 U. S., at 166.[49]

A biological relationship is not present in the case of the usual foster family. But biological relationships are not exclusive determination of the existence of a family.[50] The basic foundation of the family in our society, the marriage relationship, is of course not a matter of blood relation. Yet its importance has been strongly emphasized in our cases:

> "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better

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biological families for purposes of substantive due process review. Cf. *Moore* v. *East Cleveland, ante*, at 546–547 (WHITE, J., dissenting).

[49] The scope of these rights extends beyond natural parents. The "parent" in *Prince* itself, for example, was the child's aunt and legal custodian. 321 U. S., at 159. And see *Moore* v. *East Cleveland, ante*, at 504–506 (plurality opinion), 507–511 (BRENNAN, J., concurring).

[50] Some Justices of the Court have suggested that, at least where the substantive protection of the Due Process Clause is involved, biological

> or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Griswold* v. *Connecticut*, 381 U. S. 479, 486 (1965).

See also *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967).

Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children, *Wisconsin* v. *Yoder*, 406 U. S. 205, 231–233 (1972), as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.[51] At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.[52] For this reason, we cannot dismiss the foster family as a mere collection of unrelated indi-

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relationship alone is not sufficient to create a constitutionally protected "family." *Moore* v. *East Cleveland*, *ante*, at 536–540 (STEWART, J., dissenting) 549 (WHITE, J., dissenting).

[51] Adoption, for example, is recognized as the legal equivalent of biological parenthood. See, *e. g.*, N. Y. Dom. Rel. Law § 110, *supra*, n. 19.

[52] The briefs dispute at some length the validity of the "psychological parent" theory propounded in J. Goldstein, A. Freud, & A. Solnit, Beyond the Best Interests of the Child (1973). That book, on which appellee foster parents relied to some extent in the District Court, is indeed controversial. See, *e. g.*, Strauss & Strauss, Book Review, 74 Colum. L. Rev. 996 (1974); Kadushin, Beyond the Best Interests of the Child: An Essay

viduals. Cf. *Village of Belle Terre* v. *Boraas*, 416 U. S. 1 (1974).

But there are also important distinctions between the foster family and the natural family. First, unlike the earlier cases recognizing a right to family privacy, the State here seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements. The individual's freedom to marry and reproduce is "older than the Bill of Rights," *Griswold* v. *Connecticut*, *supra*, at 486. Accordingly, unlike the property interests that are also protected by the Fourteenth Amendment, cf. *Board of Regents* v. *Roth*, 408 U. S., at 577, the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law,[53] but in intrinsic human rights, as they have been understood in "this Nation's history and tradition." *Moore* v. *East Cleveland*, *ante*, at 503. Cf. also *Meachum* v. *Fano*, 427 U. S., at 230 (STEVENS, J., dissenting). Here, however, whatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the outset. While the Court has recognized that liberty interests may in some cases arise from positive-law sources, see, *e. g.*, *Wolff* v. *McDonnell*, 418 U. S. 539, 557 (1974), in such a case, and particularly where, as here, the claimed interest derives from a knowingly assumed contractual relation with the State, it is appropriate to ascer-

Review, 48 Soc. Serv. Rev. 508, 512 (1974). But this case turns, not on the disputed validity of any particular psychological theory, but on the legal consequences of the undisputed fact that the emotional ties between foster parent and foster child are in many cases quite close, and undoubtedly in some as close as those existing in biological families.

[53] The legal status of families has never been regarded as controlling: "Nor has the [Constitution] refused to recognize those family relationships unlegitimized by a marriage ceremony." *Stanley* v. *Illinois*, 405 U. S., at 651.

tain from state law the expectations and entitlements of the parties. In this case, the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional "liberty" in the foster family.

A second consideration related to this is that ordinarily procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty of another. Here, however, such a tension is virtually unavoidable. Under New York law, the natural parent of a foster child in voluntary placement has an absolute right to the return of his child in the absence of a court order obtainable only upon compliance with rigorous substantive and procedural standards, which reflect the constitutional protection accorded the natural family. See nn. 46, 47, *supra*. Moreover, the natural parent initially gave up his child to the State only on the express understanding that the child would be returned in those circumstances. These rights are difficult to reconcile with the liberty interest in the foster family relationship claimed by appellees. It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right—an interest the foster parent has recognized by contract from the outset.[54] Whatever liberty interest might otherwise exist in the

[54] The New York Court of Appeals has as a matter of state law "[p]articularly rejected . . . the notion . . . that third-party custodians may acquire some sort of squatter's rights in another's child." *Bennett* v. *Jeffreys*, 40 N. Y. 2d 543, 552 n. 2, 356 N. E. 2d 277, 285 n. 2 (1976).

foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents.

As this discussion suggests, appellees' claim to a constitutionally protected liberty interest raises complex and novel questions. It is unnecessary for us to resolve those questions definitively in this case, however, for, like the District Court, we conclude that "narrower grounds exist to support" our reversal. We are persuaded that, even on the assumption that appellees have a protected "liberty interest," the District Court erred in holding that the preremoval procedures presently employed by the State are constitutionally defective.

III

Where procedural due process must be afforded because a "liberty" or "property" interest is within the Fourteenth Amendment's protection, there must be determined "what process is due" in the particular context. The District Court did not spell out precisely what sort of preremoval hearing would be necessary to meet the constitutional standard, leaving to "the various defendants—state and local officials—the first opportunity to formulate procedures suitable to their own professional needs and compatible with the principles set forth in this opinion." 418 F. Supp., at 286. The court's opinion, however, would seem to require at a minimum that in all cases in which removal of a child within the certified class is contemplated, including the situation where the removal is for the purpose of returning the child to his natural parents, a hearing be held automatically, regardless of whether or not the foster parents request a hearing;[55] that the hearing be

[55] The judgment of the District Court contains a provision (see Jurisdictional Statements, Joint App. 36a, 37a), not suggested in the opinion, that "hearings need not be held when the foster child is to be removed . . . at the request of the foster parent." At oral argument, counsel for the foster parents stated that this limitation was the result of "a practical

before an officer who has had no previous contact with the decision to remove the child, and who has authority to order that the child remain with the foster parents; and that the agency, the foster parents, and the natural parents, as well as the child, if he is able intelligently to express his true feelings, and an independent representative of the child's interests, if he is not, be represented and permitted to introduce relevant evidence.

It is true that "[b]efore a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'" *Board of Regents* v. *Roth*, 408 U. S., at 570 n. 7, quoting *Boddie* v. *Connecticut*, 401 U. S. 371, 379 (1971). But the hearing required is only one "appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). See, *e. g.*, *Bell* v. *Burson*, 402 U. S. 535, 542 (1971); *Goldberg* v. *Kelly*, 397 U. S. 254, 263 (1970); *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). Only last Term, the Court held that "identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional

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consideration . . . . [I]f a foster parent feels that the child cannot stay with the foster parent any longer, it doesn't make sense to try and impose that. . . . [I]t's hard to contemplate a situation in which it would be in the best interest of a child to stay with people that had asked that the child be taken." Tr. of Oral Arg. 49. As many as one-third of transfers between foster homes may be at the request of the foster parents. N. 15, *supra*.

or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976). Consideration of the procedures employed by the State and New York City in light of these three factors requires the conclusion that those procedures satisfy constitutional standards.

Turning first to the procedure applicable in New York City, SSC Procedure No. 5, see *supra*, at 831, and n. 29, provides that before a child is removed from a foster home for transfer to another foster home, the foster parents may request an "independent review." The District Court's description of this review is set out in the margin.[56] Such a procedure would appear to give a more elaborate trial-type hearing to foster families than this Court has found required in other contexts of administrative determinations. Cf. *Goldberg* v. *Kelly*, *supra*, at 266–271. The District Court found the procedure inadequate on four grounds, none of which we find sufficient to justify the holding that the procedure violates due process.

[56] "As of July 1, 1974, New York City has provided, at the foster parent's request, as a substitute for or supplement to the agency conference, a pre-removal 'independent review' conducted 'in accordance with the concepts of due process.' Its salient features, as set forth in an internal memorandum of August 5, 1974, are as follows: (1) the review is heard before a supervisory official who has had no previous involvement with the decision to remove the child; (2) both the foster parents and the agency may be represented by counsel and each may present witnesses and evidence; (3) all witnesses must be sworn, unless stipulated otherwise, and all testimony is subject to cross-examination; (4) counsel for the foster parents must be allowed to examine any portion of the agency's files used to support the proposal to remove the child; (5) either a tape recording or stenographic record of the hearing must be kept and made available to the parties at cost; and (6) a written decision, supported by reasons, must be rendered within five days and must include a reminder to the foster parents that they may still request a post-removal hearing under N. Y. C. R. R. § 450.14." 418 F. Supp., at 285.

First, the court held that the "independent review" administrative proceeding was insufficient because it was only available on the request of the foster parents. In the view of the District Court, the proceeding should be provided as a matter of course, because the interests of the foster parents and those of the child would not necessarily be coextensive, and it could not be assumed that the foster parents would invoke the hearing procedure in every case in which it was in the child's interest to have a hearing. Since the child is unable to request a hearing on his own, automatic review in every case is necessary. We disagree. As previously noted, the constitutional liberty, if any, sought to be protected by the New York procedures is a right of *family* privacy or autonomy, and the basis for recognition of any such interest in the foster family must be that close emotional ties analogous to those between parent and child are established when a child resides for a lengthy period with a foster family. If this is so, necessarily we should expect that the foster parents will seek to continue the relationship to preserve the stability of the family; if they do not request a hearing, it is difficult to see what right or interest of the foster child is protected by holding a hearing to determine whether removal would unduly impair his emotional attachments to a foster parent who does not care enough about the child to contest the removal.[57] Thus, consideration of the interest to be protected and the likelihood of erroneous deprivations,[58] the first two

[57] The District Court itself apparently relied on similar logic, in exempting in its judgment removals requested by foster parents from the mandatory hearing requirement. See n. 55, *supra*. In terms of the emotional cohesion of the family, the difference between a foster parent who requests removal of the foster child, and one who merely consents to removal seems irrelevant.

[58] In assessing the likelihood of erroneous decisions by the agency in the absence of elaborate hearing procedures, the fact that the agency bears primary responsibility for the welfare of the child, and maintains,

factors identified in *Mathews* v. *Eldridge, supra,* as appropriate in determining the sufficiency of procedural protections, do not support the District Court's imposition of this additional requirement. Moreover, automatic provision of hearings as required by the District Court would impose a substantial additional administrative burden on the State. According to appellant city officials, during the approximately two years between the institution of SSC Procedure No. 5 in August 1974 and June 1976, there were approximately 2,800 transfers per year in the city, but only 26 foster parents requested hearings. Brief for Appellants in No. 76–180, pp. 20–21. It is not at all clear what would be gained by requiring full hearings in the more than 5,500 cases in which they were not requested.

Second, the District Court faulted the city procedure on the ground that participation is limited to the foster parents and the agency, and the natural parent and the child are not made parties to the hearing. This is not fatal in light of the nature of the alleged constitutional interests at stake. When the child's transfer from one foster home to another is pending, the interest arguably requiring protection is that of the foster family, not that of the natural parents. Moreover, the natural parent can generally add little to the accuracy of factfinding concerning the wisdom of such a transfer, since the foster parents and the agency, through its caseworkers, will usually be most knowledgeable about conditions in the foster home. Of course, in those cases where the natural parent does have a special interest in the proposed transfer

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through its caseworkers, constant contact with the foster family is relevant. The foster parent always has the opportunity to present information to the agency at this stage. We, of course, do not suggest that such informal "process" can ever do service for the fundamental requirements of due process. Cf. *In re Gault,* 387 U. S. 1 (1967). But it should not routinely be assumed that any decision made without the forms of adversary factfinding familiar to the legal profession is necessarily arbitrary or incorrect.

or particular information that would assist the factfinder, nothing in the city's procedure prevents any party from securing his testimony.

Much the same can be said in response to the District Court's statement:

> "[I]t may be advisable, under certain circumstances, for the agency to appoint an adult representative better to articulate the interests of the child. In making this determination, the agency should carefully consider the child's age, sophistication and ability effectively to communicate his own true feelings." 418 F. Supp., at 285–286.

But nothing in the New York City procedure prevents consultation of the child's wishes, directly or through an adult intermediary. We assume, moreover, that some such consultation would be among the first steps that a rational factfinder, inquiring into the child's best interests, would pursue. Such consultation, however, does not require that the child or an appointed representative must be a party with full adversary powers in all preremoval hearings.[59]

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[59] Appointment of such representatives in each of the numerous cases in which the foster child is very young would, of course, represent a major administrative burden on the State. This burden would be balanced by little gain in accuracy of decisionmaking, since the appointed representative's inquiry into the best interests of the child would essentially duplicate that already conducted by the agency and that to be conducted at the hearing by the administrative decisionmaker.

Moreover, the State's interest in avoiding "fiscal and administrative burdens," *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976), is not the only interest that must be weighed against requiring still more elaborate hearing procedures. As the District Court acknowledged, where delicate judgments concerning "the often ambiguous indices of a child's emotional attachments and psychological development" are involved, we must also consider the possibility that making the decisionmaking process increasingly adversary "might well impede the effort to elicit the sensitive and personal information required," 418 F. Supp., at 286, or make the struggle for

The other two defects in the city procedure found by the District Court must also be rejected. One is that the procedure does not extend to the removal of a child from foster care to be returned to his natural parent. But as we have already held, whatever liberty interest may be argued to exist in the foster family is significantly weaker in the case of removals preceding return to the natural parent, and the balance of due process interests must accordingly be different. If the city procedure is adequate where it is applicable, it is no criticism of the procedure that it does not apply in other situations where different interests are at stake. Similarly, the District Court pointed out that the New York City procedure coincided with the informal "conference" and postremoval hearings provided as a matter of state law. This overlap in procedures may be unnecessary or even to some degree unwise, see *id.*, at 285, but a State does not violate the Due Process Clause by providing alternative or additional procedures beyond what the Constitution requires.

Outside New York City, where only the statewide procedures apply, foster parents are provided not only with the procedures of a preremoval conference and postremoval hearing provided by 18 N. Y. C. R. R. § 450.10 (1976) and Soc. Serv. Law § 400 (McKinney 1976), see *supra*, at 829–830, but also with the preremoval *judicial* hearing available on request to foster parents who have in their care children who have been in foster care for 18 months or more, Soc. Serv. Law § 392. As observed *supra*, at 832, and n. 32, a foster parent in such case may obtain an order that the child remain in his care.

The District Court found three defects in this full judicial process. First, a § 392 proceeding is available only to those foster children who have been in foster care for 18 months or more. The class certified by the court was broader, including

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custody, already often difficult for the child, see, *e. g.*, Kadushin 404, even more traumatic. In such a situation, there is a value in less formalized hearing procedures. See also n. 57, *supra*.

children who had been in the care of the same foster parents for more than one year. Thus, not all class members had access to the § 392 remedy.[60] We do not think that the 18-month limitation on § 392 actions renders the New York scheme constitutionally inadequate. The assumed liberty interest to be protected in this case is one rooted in the emotional attachments that develop over time between a child and the adults who care for him. But there is no reason to assume that those attachments ripen at less than 18 months or indeed at any precise point. Indeed, testimony in the record, see App. 177a, 204a, as well as material in published psychological texts, see, *e. g.*, J. Goldstein, A. Freud, & A. Solnit, Beyond the Best Interests of the Child 40–42, 49 (1973), suggests that the amount of time necessary for the development of the sort of tie appellees seek to protect varies considerably depending on the age and previous attachments of the child. In a matter of such imprecision and delicacy, we see no justification for the District Court's substitution of its view of the appropriate cutoff date for that chosen by the New York Legislature, given that any line is likely to be somewhat arbitrary and fail to protect some families where relationships have developed quickly while protecting others where no such bonds have formed. If New York sees 18 months rather than 12 as the time at which temporary foster care begins to turn into a more permanent and family-like setting requiring procedural protection and/or judicial inquiry into the propriety of continuing foster care, it would take far more than this record

[60] Since the class certified by the District Court embraces all foster parents who have had a foster child living *with them* for over one year, while § 392 is limited in application to children in foster care for 18 months, each class includes some children not included in the other. For example, a child who had been in foster care for 13 months, all of it with the same family, is a member of the certified class but not eligible for § 392 review. On the other hand, a child who has been in foster care for two years but not with the same family, is eligible for § 392 review but is not a member of the certified class.

provides to justify a finding of constitutional infirmity in New York's choice.

The District Court's other two findings of infirmity in the § 392 procedure have already been considered and held to be without merit. The District Court disputed defendants' reading of § 392 as permitting an order requiring the leaving of the foster child in the same foster home. The plain words of the statute and the weight of New York judicial interpretation do not support the court. See *supra*, at 832, and n. 32. The District Court also faulted § 392, as it did the New York City procedure, in not providing an automatic hearing in every case even in cases where foster parents chose not to seek one. Our holding sustaining the adequacy of the city procedure, *supra*, at 850–851, applies in this context as well.[61]

Finally, the § 392 hearing is available to foster parents, both in and outside New York City, even where the removal sought is for the purpose of returning the child to his natural parents. Since this remedy provides a sufficient constitutional pre-removal hearing to protect whatever liberty interest might exist in the continued existence of the foster family when the State seeks to transfer the child to another foster home, *a fortiori* the procedure is adequate to protect the lesser interest of the foster family in remaining together at the expense of the disruption of the natural family.

We deal here with issues of unusual delicacy, in an area where professional judgments regarding desirable procedures are constantly and rapidly changing. In such a context, restraint is appropriate on the part of courts called upon to

[61] In this Court, as in the District Court, the primary reliance of the defendants and intervenors has been on the adequacy of § 392 as a procedure for protecting the interests of the foster family, without as fully addressing the adequacy otherwise of the procedures provided by 18 N. Y. C. R. R. § 450.10 and Soc. Serv. Law § 400. Our consequent emphasis upon the adequacy of § 392 procedures as requiring reversal of the District Court is not to be understood to imply any view upon the adequacy of the alternative administrative remedies to protect those interests.

adjudicate whether a particular procedural scheme is adequate under the Constitution. Since we hold that the procedures provided by New York State in § 392 and by New York City's SSC Procedure No. 5 are adequate to protect whatever liberty interests appellees may have, the judgment of the District Court is

Reversed.

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the judgment.

The foster parent-foster child relationship involved in this litigation is, of course, wholly a creation of the State. New York law defines the circumstances under which a child may be placed in foster care, prescribes the obligations of the foster parents, and provides for the removal of the child from the foster home "in [the] discretion" of the agency with custody of the child. N. Y. Soc. Serv. Law § 383 (2) (McKinney 1976). The agency compensates the foster parents, and reserves in its contracts the authority to decide as it sees fit whether and when a child shall be returned to his natural family or placed elsewhere. See Part I–A of the Court's opinion, *ante*, at 823–828. Were it not for the system of foster care that the State maintains, the relationship for which constitutional protection is asserted would not even exist.

The New York Legislature and the New York courts have made it unmistakably clear that foster care is intended only as a temporary way station until a child can be returned to his natural parents or placed for adoption. Thus, Soc. Serv. Law § 384–b (1)(b) (McKinney Supp. 1976–1977) states a legislative finding that "many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, pro-

ductive citizens." And, specifically repudiating the contention that New York law contemplates that a child will have a "secure, stable and continuous" relationship with a third-party custodian as the child's "psychological parent," the New York Court of Appeals has "[p]articularly rejected the notion, if that it be, that third-party custodians may acquire some sort of squatter's rights in another's child." *Bennett* v. *Jeffreys*, 40 N. Y. 2d 543, 552 n. 2, 356 N. E. 2d 277, 285 n. 2.

In these circumstances, I cannot understand why the Court thinks itself obliged to decide these cases on the assumption that either foster parents or foster children in New York have some sort of "liberty" interest in the continuation of their relationship.[1] Rather than tiptoeing around this cen-

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[1] The Court's opinion seems to indicate that there is no reason to distinguish between the claims of the foster parents and the foster children, either because the parents have standing to assert the rights of the children or because the parents' interest is identical to that of the children. See *ante*, at 841–842, nn. 44, 45. I cannot agree.

First, it is by no means obvious that foster parents and foster children have the same interest in a continuation of their relationship. When the child leaves the foster family, it is because the agency with custody of him has determined that his interests will be better served by a new home, either with his natural parents, adoptive parents, or a different foster family. Any assessment of the child's alleged deprivation must take into account not only what he has lost, but what he has received in return. Foster parents, on the other hand, do not automatically receive a new child with whom they will presumably have a more profitable relationship.

Second, unlike the situation in *Craig* v. *Boren*, 429 U. S. 190, 195–196, this is not a case where the failure to grant the parents their requested relief will inevitably tend to "[dilute] or adversely [affect]" the alleged constitutional rights of the children. Denying the parents a hearing simply has no effect whatever on the children's separate claim to a hearing, and does not impair their alleged constitutional rights. There is therefore no standing in the parents to assert the children's claims. See Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 432 (1974), cited in *Craig*, *supra*, at 195.

I would nevertheless consider both the parents' and the children's claims in these cases, but only because the suit was originally brought on

tral issue, I would squarely hold that the interests asserted by the appellees are not of a kind that the Due Process Clause of the Fourteenth Amendment protects.

At the outset, I would reject, as does the Court, the apparent holding of the District Court that "the trauma of separation from a familiar environment" or the "harmful consequences of a precipitous and perhaps improvident decision to remove a child from his foster family," *Organization of Foster Families* v. *Dumpson*, 418 F. Supp. 277, 283, constitutes a "grievous loss" which therefore is protected by the Fourteenth Amendment. Not every loss, however "grievous," invokes the protection of the Due Process Clause. Its protections extend only to a deprivation by a State of "life, liberty, or property." And when a state law does operate to deprive a person of his liberty or property, the Due Process Clause is applicable even though the deprivation may not be "grievous." *Goss* v. *Lopez*, 419 U. S. 565, 576. "[T]o determine whether due process requirements apply in the first place, we look not to the 'weight' but to the *nature* of the interest at stake." *Board of Regents* v. *Roth*, 408 U. S. 564, 570–571. See *Ingraham* v. *Wright*, 430 U. S. 651, 672; *Meachum* v. *Fano*, 427 U. S. 215, 224; *Goss* v. *Lopez*, *supra*, at 575–576.

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behalf of both the parents and the children, all of whom were parties plaintiff. While it is true that their interests may conflict, there was no reason not to allow counsel for the parents to continue to represent the children to the extent that their interests may be compatible. The conflict was avoided by the District Court's appointment of independent counsel, who took a position opposite to that of the foster parents as to where the children's welfare lay. The appointment of independent counsel, however, should not have left the children without advocacy for the position, right or wrong, that they are entitled to due process hearings. That position should have been left to be asserted by the counsel who originally brought the suit for the children. My view, therefore, is that the parents and the children are properly before the Court and entitled to assert their own separate claims, but that neither group has standing to assert the claims of the other.

Clearly, New York has deprived nobody of his life in these cases. It seems to me just as clear that the State has deprived nobody of his liberty or property. Putting to one side the District Court's erroneous "grievous loss" analysis, the appellees are left with very little ground on which to stand. Their argument seems to be that New York, by providing foster children with the opportunity to live in a foster home and to form a close relationship with foster parents, has created "liberty" or "property" that it may not withdraw without complying with the procedural safeguards that the Due Process Clause confers. But this Court's decision in *Meachum* v. *Fano, supra,* illustrates the fallacy of that argument.

At issue in *Meachum* was a claim by Massachusetts state prisoners that they could not constitutionally be transferred to another institution with less favorable living conditions without a prior hearing that would fully probe the reasons for their transfer. In accord with previous cases, see, *e. g., Goss* v. *Lopez, supra; Wolff* v. *McDonnell,* 418 U. S. 539; *Board of Regents* v. *Roth, supra; Perry* v. *Sindermann,* 408 U. S. 593; *Goldberg* v. *Kelly,* 397 U. S. 254, the Court recognized that where state law confers a liberty or property interest, the Due Process Clause requires certain minimum procedures " 'to ensure that the state-created right is not arbitrarily abrogated.' " 427 U. S., at 226, quoting *Wolff, supra,* at 557. But the predicate for invoking the Due Process Clause—the existence of state-created liberty or property—was missing in *Meachum* just as it is missing here. New York confers no right on foster families to remain intact, defeasible only upon proof of specific acts or circumstances. As was true of prison transfers in *Meachum,* transfers in and out of foster families "are made for a variety of reasons and often involve no more than informed predictions as to what would best serve . . . the safety and welfare of the [child]." 427 U. S., at 225.

Similarly, New York law provides no basis for a justifiable expectation on the part of foster families that their relationship will continue indefinitely. Cf. *Perry* v. *Sindermann*, *supra*, at 599–603. The District Court in this litigation recognized as much, noting that the typical foster-care contract gives the agency the right to recall the child "upon request," and commenting that the discretionary authority vested in the agency "is on its face incompatible with plaintiffs' claim of legal entitlement." 418 F. Supp., at 281. To be sure, the New York system has not operated perfectly. As the state legislature found, foster care has in many cases been unnecessarily protracted, no doubt sometimes resulting in the expectation on the part of some foster families that their relationship will continue indefinitely. But, as already noted, the New York Court of Appeals has unequivocally rejected the notion that under New York law prolonged third-party custody of children creates some sort of "squatter's rights." And, as this Court stated in *Perry* v. *Sindermann*, *supra*, at 603, a mere subjective "expectancy" is not liberty or property protected by the Due Process Clause.

This is not to say that under the law of New York foster children are the pawns of the State, who may be whisked from family to family at the whim of state officials. The Court discusses in Part III of its opinion the various state and local procedures intended to assure that agency discretion is exercised in a manner consistent with the child's best interests. Unlike the prison transfer situation in *Meachum* v. *Fano*, it does not appear that child custody decisions can be made "for whatever reason or for no reason at all." 427 U. S., at 228. But the protection that foster children have is simply the requirement of state law that decisions about their placement be determined in the light of their best interests. See, *e. g.*, *Bennett* v. *Jeffreys*, 40 N. Y. 2d 543, 356 N. E. 2d 277; *In re Jewish Child Care Assn. (Sanders)*, 5 N. Y. 2d 222, 156 N. E. 2d 700; *State ex rel. Wallace* v. *Lhotan*,

51 App. Div. 2d 252, 380 N. Y. S. 2d 250, appeal dismissed and leave to appeal denied, 39 N. Y. 2d 705. This requirement is not "liberty or property" protected by the Due Process Clause, and it confers no right or expectancy of any kind in the continuity of the relationship between foster parents and children. See, *e. g., Bennett, supra,* at 552 n. 2, 356 N. E. 2d, at 285 n. 2: "Third-party custodians acquire 'rights' . . . only derivatively by virtue of the child's best interests being considered . . . ."

What remains of the appellees' argument is the theory that the relation of the foster parent to the foster child may generate emotional attachments similar to those found in natural families. The Court surmises that foster families who share these attachments might enjoy the same constitutional interest in "family privacy" as natural families. See, *e. g., Moore* v. *East Cleveland, ante,* at 504–505 (plurality opinion of POWELL, J.); *Roe* v. *Wade,* 410 U. S. 113, 152–153; *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Meyer* v. *Nebraska,* 262 U. S. 390.

On this score, the Court hypothesizes the case of "a child [who] has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents . . . ." *Ante,* at 844. The foster family might then "hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family." *Ibid.*

But under New York's foster-care laws, any case where the foster parents had assumed the emotional role of the child's natural parents would represent not a triumph of the system, to be constitutionally safeguarded from state intrusion, but a failure. The goal of foster care, at least in New York, is not to provide a permanent substitute for the natural or adoptive home, but to prepare the child for his return to his real parents or placement in a permanent adoptive home

by giving him temporary shelter in a family setting. See Part I–A of the Court's opinion, *ante*, at 823–828. Thus, the New York Court of Appeals has recognized that the development of close emotional ties between foster parents and a child may hinder the child's ultimate adjustment in a permanent home, and provide a basis for the *termination* of the foster family relationship. *In re Jewish Child Care Assn. (Sanders), supra.*[2] See also *State ex rel. Wallace* v. *Lhotan, supra.* Perhaps it is to be expected that children who spend unduly long stays in what should have been temporary foster care will develop strong emotional ties with their foster parents. But this does not mean, and I cannot believe, that such breakdowns of the New York system must be protected or forever frozen in their existence by the Due Process Clause of the Fourteenth Amendment.[3]

One of the liberties protected by the Due Process Clause, the Court has held, is the freedom to "establish a home and bring up children." *Meyer* v. *Nebraska, supra,* at 399. If a State were to attempt to force the breakup of a natural family,

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[2] "That the Sanders have given Laura a good home and have shown her great love does not stamp as an abuse of discretion the Trial Justice's determination to take her from them. Indeed, it is the extreme of love, affection and possessiveness manifested by the Sanders, together with the conduct which their emotional involvement impelled, that supplies the foundation of reasonableness and correctness for his determination. The vital fact is that Mr. and Mrs. Sanders are not, and presumably will never be, Laura's parents by adoption. Their disregard of that fact and their seizure of full parental status in the eyes of the child might well be, or so the Trial Justice was entitled to find, a source of detriment to the child in the circumstances presented." 5 N. Y. 2d., at 229, 156 N. E. 2d, at 703.

[3] The consequences of extending constitutional protection to the foster family relationship are, as the Court points out, *ante,* at 846–847, especially absurd when the child would otherwise be immediately returned to his natural parents. If the foster family relationship were to occupy the same constitutional plane as that of the natural family, the conflict between the constitutional rights of natural and foster parents would be totally irreconcilable.

over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on "the private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, 321 U. S. 158, 166. But this constitutional concept is simply not in point when we deal with foster families as New York law has defined them. The family life upon which the State "intrudes" is simply a temporary status which the State itself has created. It is a "family life" defined and controlled by the law of New York, for which New York pays, and the goals of which New York is entitled to and does set for itself.

For these reasons I concur in the judgment of the Court.

UNITED STATES ET AL. *v.* LARIONOFF ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76–413. Argued April 27, 1977—Decided June 13, 1977

Respondent enlisted members of the United States Navy and others similarly situated, who agreed to extend their enlistments at a time when a statute provided for a Variable Re-enlistment Bonus (VRB), in addition to the Regular Re-enlistment Bonus (RRB), for members of the Armed Forces whose ratings were classified as a "critical military skill" *held* entitled to VRB's determined according to the award level in effect at the time they agreed to extend their enlistments, notwithstanding that the Navy eliminated their ratings from the "critical military skill" list before they began serving their extended enlistments, and that the statutes authorizing the RRB and VRB were repealed and a new Selective Re-enlistment Bonus (SRB) substituted before one of the respondents began to serve his extended enlistment. Pp. 869–882.

(a) Implementing regulations requiring that the amount of the VRB to be awarded to an enlisted member who extended his enlistment be determined by reference to the award level in effect at the time he began to serve his extended enlistment, rather than at the time he agreed to the extension, are invalid as being contrary to Congress' purpose, as manifested by the legislative history, in enacting the VRB program as an inducement to selected service members to extend their period of service. Whether a service member re-enlists or agrees to extend his enlistment, the VRB could only be effective as a selective incentive to extension of service if at the time he made his decision the service member could count on receiving it if he elected to remain in the service. Pp. 869–877.

(b) There is nothing in either the language or legislative history of the statute repealing the RRB and VRB system and establishing a new bonus system to show any intention on the part of Congress to affect the rights of those service members who had extended their enlistments and became entitled to receive VRB's. Pp. 878–882.

175 U. S. App. D. C. 32, 533 F. 2d 1167, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, MARSHALL, POWELL, and STEVENS, JJ., joined. WHITE, J., filed a dissent-

ing opinion, in which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 882.

Deputy Solicitor General Jones argued the cause for the United States et al. With him on the briefs were *Solicitor General McCree*, former *Acting Solicitor General Friedman*, *Acting Assistant Attorney General Babcock*, and *Robert E. Kopp*.

Stephen Daniel Keeffe argued the cause and filed a brief for respondents.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Seven enlisted members of the United States Navy brought this class action in the District Court for the District of Columbia under the Tucker Act, 28 U. S. C. § 1346 (a)(2), alleging that their agreements to extend their enlistments, made at various times from 1968 to 1970, entitled each of them to payment of a re-enlistment bonus. The District Court ordered that the bonuses be paid, 365 F. Supp. 140 (1973), and the Court of Appeals for the District of Columbia Circuit affirmed. 175 U. S. App. D. C. 32, 533 F. 2d 1167 (1976). We granted certiorari, 429 U. S. 997 (1976). We affirm.

I

From early in our history, Congress has provided by statute for payment of a re-enlistment bonus to members of the Armed Services who re-enlisted upon expiration of their term of service, or who agreed to extend their period of service before its expiration.[1] Prior to the enactment of Pub. L. No. 89–132, 79 Stat. 547 (1965), this bonus was determined for an enlistee's first re-enlistment or extension of enlistment by multiplying his monthly pay at the time of expiration of the initial period

[1] The Court of Appeals opinion traces the history of this policy from 1795 to the present. 175 U. S. App. D. C., at 37–38, and n. 16, 533 F. 2d, at 1172–1173, and n. 16.

of service by the number of years specified in the re-enlistment agreement. See former 37 U. S. C. §§ 308 (a), (b).

The perceived defect of this system was that "it failed to vary the monetary incentive for reenlistment according to the needs of the armed services for personnel with particular skills." 175 U. S. App. D. C., at 38, 533 F. 2d, at 1173. Consequently, Congress enacted former 37 U. S. C. § 308 (g), which authorized the services to provide, in addition to the Regular Re-enlistment Bonus (RRB) just described, a Variable Re-enlistment Bonus (VRB) to members of the Armed Services whose particular skills were in short supply. The VRB was to be a multiple, no greater than four, of the RRB.[2]

This program was in effect when respondent Nicholas J. Larionoff enlisted in the Navy for four years on June 23,

[2] Former 37 U. S. C. § 308 (g), 79 Stat. 547, provided as follows:

"(g) Under regulations to be prescribed by the Secretary of Defense, or the Secretary of the Treasury with respect to the Coast Guard when it is not operating as a service in the Navy, a member who is designated as having a critical military skill and who is entitled to a bonus computed under subsection (a) of this section upon his first reenlistment may be paid an additional amount not more than four times the amount of that bonus. The additional amount shall be paid in equal yearly installments in each year of the reenlistment period. However, in meritorious cases the additional amount may be paid in fewer installments if the Secretary concerned determines it to be in the best interest of the members. An amount paid under this subsection does not count against the limitation prescribed by subsection (c) of this section on the total amount that may be paid under this section."

Under the Department of Defense regulations implementing the VRB program, multiples of one to four times the RRB were assigned depending on the relative urgency of the services' need for particular skills, as measured by personnel shortages and the cost of training replacement personnel. Department of Defense Directive 1304.14, ¶¶ IV.D.1.a, b (Sept. 3, 1970); Department of Defense Instruction 1304.15, ¶¶ IV.D, V.A.1, 2 (Sept. 3, 1970).

Under 37 U. S. C. § 906, "[a] member of the [Armed Forces] who extends his enlistment . . . is entitled to the same pay and allowances as though he had reenlisted."

1969.[3] Shortly after his enlistment, Larionoff chose to participate in a Navy training program, completion of which would qualify him for the service rating "Communications Technician—Maintenance" (CTM). At that time, as Larionoff was aware,[4] the CTM rating was classified by Navy regulations as a "critical military skill," whose holders were eligible upon re-enlistment or extension of enlistment for payment of a VRB in the amount of four times the RRB, the highest allowable rate. Before entering the training program, which entailed a six-year service obligation, Larionoff entered a written agreement to extend his enlistment "in consideration of the pay, allowances, and benefits which will accrue to me during the continuance of my service." Larionoff successfully completed the program and was advanced to the CTM rating, expecting to receive a VRB upon entering the period of his extended enlistment on June 23, 1973.[5]

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[3] Except as noted below with specific reference to respondent Johnnie S. Johnson, the facts relating to Larionoff are typical of those concerning the other named respondents.

[4] Larionoff was informed of the existence of the VRB program, and its applicability to the CTM program, by a Navy "classifier" who interviewed him to determine what field within the service he should enter. Several of the other named respondents were also told of the existence of the VRB program, and in some instances the amount of the VRB they could expect to receive was calculated for them by Navy personnel, without any indication that the amount might be reduced. 175 U. S. App. D. C., at 35, 36, and nn. 6, 11, 533 F. 2d, at 1170, 1171, and nn. 6, 11. These facts, contained in affidavits filed by respondents, are undisputed; while an affidavit introduced by the Government states that "it is not the policy of the Department of the Navy to promise specific eligibility for Variable Reenlistment Bonus, nor is any official authorized to make such a promise in counselling with a prospective enlistee," there is no dispute that in particular cases individual service members might, inadvertently or otherwise, be left with the impression that a VRB had been promised.

[5] Under former 37 U. S. C. § 308 (g), the VRB was paid "in equal yearly installments in each year of the reenlistment period."

On March 24, 1972, however, the Navy announced that effective July 1, 1972, the CTM rating would no longer be considered a "critical military skill" eligible for a VRB. When Larionoff, through his congressional representatives, inquired into his continued eligibility for a VRB, he was informed that since the CTM rating was no longer listed, he would not receive the expected bonus. Accordingly, in March 1973, respondents filed this lawsuit, and in September of that year the District Court certified a class and granted summary judgment for respondents, ordering payment of the disputed VRB's.

While the Government's appeal of this order was pending in the Court of Appeals, Congress repealed the statutes authorizing both the RRB and the VRB, and substituted a new Selective Re-enlistment Bonus (SRB), effective June 1, 1974. Armed Forces Enlisted Personnel Bonus Revision Act of 1974, 88 Stat. 119, 37 U. S. C. § 308 (1970 ed., Supp. V). The Government concedes that this action had no effect on six of the named respondents; like Larionoff, they were scheduled to begin serving their extended enlistments prior to the effective date of the Act, and therefore should have received their VRB's, if at all, while the program was still in effect.[6] Respondent Johnnie S. Johnson, however, first enlisted in the Navy in August 1970, and did not begin serving his extended enlistment until August 1974. The Court of Appeals was thus confronted with two questions: (1) whether Larionoff and those in his position were entitled to receive VRB's despite the Navy's elimination of their rating from the eligible list in the period after their agreement to extend their enlistments but before they began serving those extensions; and (2) whether Johnson and others in his situation were entitled to receive VRB's despite the repeal of the VRB program in the same

[6] But see n. 23, *infra*.

period. The Court of Appeals held that both were entitled to receive VRB's.

II

A

Both the Government and respondents recognize that "[a] soldier's entitlement to pay is dependent upon statutory right," *Bell* v. *United States*, 366 U. S. 393, 401 (1961), and that accordingly the rights of the affected service members must be determined by reference to the statutes and regulations governing the VRB, rather than to ordinary contract principles.[7] In this case, the relevant statute, former 37 U. S. C. § 308 (g), provided:

> "Under regulations to be prescribed by the Secretary of Defense, . . . a member who is designated as having a critical military skill and who is entitled to [an RRB] upon his first reenlistment may be paid an additional amount not more than four times the amount of [the RRB]."

The regulations governing individual eligibility were set forth in Department of Defense Instruction 1304.15, ¶ V.B.1 (Sept. 3, 1970).[8]

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[7] Indeed, this is implicitly recognized in the contracts executed by the named respondents, which state that they agree to extend their enlistments "in consideration of the pay, allowances, and benefits which will accrue to me during the continuance of my service," rather than stating any fixed compensation.

[8] This regulation provided:

"B. *Individual Eligibility for Receipt of Awards*

"1. *Variable Reenlistment Bonus.* An enlisted member is eligible to receive a Variable Reenlistment Bonus if he meets all the following conditions:

"a. Is qualified and serving on active duty in a military specialty designated under provisions of paragraph V.A.2. above for award of the Variable Reenlistment Bonus. Members paid a Variable Reenlistment Bonus shall continue to serve in the military specialty which

The Government contends that these eligibility criteria are to be applied as of the time the enlisted member completes service of his original enlistment and enters into the extended

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qualified them for the bonus unless the Secretary of a Military Department determines that a waiver of this restriction is necessary in the interest of the Military Service concerned.

"b. Has completed at least 21 months of continuous active service other than active duty for training immediately prior to discharge, release from active duty, or extension of enlistment.

"c. Is serving in pay grade E-3 or higher.

"d. Reenlists in a regular component of the Military Service concerned within three (3) months (or within a lesser period if so prescribed by the Secretary of the Military Department concerned) after the date of his discharge or release from compulsory or voluntary active duty (other than for training), or extends his enlistment, so that the reenlistment or enlistment as extended provides a total period of continuous active service of not less than sixty-nine (69) months.

"(1) The reenlistment or extension of enlistment must be a first reenlistment or extension for which a reenlistment bonus is payable.

"(2) No reenlistment or extension accomplished for any purpose other than continued active service in the designated military specialty shall qualify a member for receipt of the Variable Reenlistment Bonus.

"(3) Continued active service in a designated military specialty shall include normal skill progression as defined in the respective Military Service classification manuals.

"e. Has not more than eight years of total active service at the time of reenlistment or extension of enlistment.

"f. Attains eligibility prior to the effective date of termination of awards in any military specialty designated for termination of the award. Member must attain eligibility prior to the effective date of a reduction of award level to be eligible for the higher award level. Eligibility attained through any modification of an existing service obligation, including any early discharge granted pursuant to 10 U. S. C. 1171, must have been attained prior to the date the authority approving the modification was notified of the prospective termination or reduction of award in the military specialty.

"g. Meets such additional eligibility criteria as may be prescribed by the Secretary of the Military Department concerned."

Instruction 1304.15 has been canceled by Department of Defense Instruction 1304.22 (June 1975).

enlistment. This is a reasonable construction, since the statute requires that the VRB not be paid until that time. See n. 5, *supra*. At that time, it is argued, respondents did not satisfy two related criteria prescribed by ¶ V.B.1, although it is conceded they met the others. First, they were not then "serving . . . in a military specialty designated" as a critical military skill, ¶ V.B.1.a, since the CTM rating was by that time no longer so designated; second, they had not "[a]ttain[ed] eligibility prior to the effective date of termination of awards" for the CTM rating. ¶ V.B.1.f.

The Government also relies upon the regulations governing the amount of the award to be received. Under Department of Defense Directive 1304.14, ¶ IV.F (Sept. 3, 1970):

> "When a military skill is designated for reduction or termination of award an effective date for reduction or termination of awards shall be established and announced to the field at least 90 days in advance. *All awards on or after that effective date in military skills designated for reduction of award level will be at the level effective that date and no new awards will be made on or after the effective date in military skills designated for termination of awards.*" [9] (Emphasis added.)

Similarly, Department of Defense Instruction 1304.15, *supra*, ¶ VI.A, stated:

> "Members serving in a military specialty designated for reduction or termination of award under the provisions of subsection IV.F. of [Directive 1304.14, *supra*] will receive the award level effective on the date of their reenlistment or extension of enlistment, except as provided in paragraph V.B.1.f. above." [10]

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[9] Directive 1304.14 has been canceled by Department of Defense Directive 1304.21 (June 1975).

[10] The reference is apparently to the last sentence of ¶ V.B.1.f, *supra*, n. 8, which provided: "Eligibility attained through any modification of an existing service obligation . . . must have been attained prior to

The Government argues that these regulations, read together, establish that respondents were entitled to receive only the VRB in effect for their service rating at the time the period of their original enlistment ended, and the extended enlistment began.

These regulations, as the Court of Appeals pointed out and the Government freely concedes, contain a number of ambiguities. See 175 U. S. App. D. C., at 40–42, 533 F. 2d, at 1175–1177. We need not tarry, however, over the various ambiguous terms and complex interrelations of the regulations. In construing administrative regulations, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 414 (1945). See also *INS* v. *Stanisic*, 395 U. S. 62 (1969). The Government represents, and respondents do not seriously dispute, that throughout the period in which the VRB program was in effect, the Navy interpreted the Department of Defense regulations as entitling an enlisted member who extends his enlistment to the VRB level, if any, in effect at the time he began to serve the extended enlistment.[11] Since this interpre-

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the date the authority approving the modification was notified of the prospective termination or reduction of award . . . ." The Court of Appeals interpreted this provision as intended to prevent service members from qualifying for a soon-to-be-reduced benefit level by agreeing to extend their enlistments in the interval between the announcement of the reduction in award level and the effective date of the change, and hence an implicit recognition that in the absence of such a provision service members in that position would be entitled to the higher benefit level. 175 U. S. App. D. C., at 41–42, 533 F. 2d, at 1176–1177. The Government argues, however, that the purpose of ¶ V.B.1.f was to reach the much smaller group of service members who would be in a position both to agree to extend their enlistment and to begin serving the extension within the relevant period. Tr. of Oral Arg. 15–16.

[11] This has apparently been the practice regardless of whether that level was higher or lower than that in effect when the service member agreed to extend his enlistment. *Id.*, at 45.

tation is not plainly inconsistent with the wording of the regulations, we accept the Government's reading of those regulations as correct.

B

This, however, does not end our inquiry. For regulations, in order to be valid, must be consistent with the statute under which they are promulgated.[12] We are persuaded that insofar as they required that the amount of the VRB to be awarded to a service member who extended his enlistment was to be determined by reference to the award level in effect at the time he began to serve the extension, rather than at the time he agreed to it, the relevant regulations were contrary to the manifest purposes of Congress in enacting the VRB program, and hence invalid.[13]

The legislative history of the VRB statute makes those congressional purposes crystal clear. As noted above, the re-enlistment bonus scheme in effect before 1965, which relied entirely on the RRB, was criticized for providing the same re-enlistment incentive to all members of the Armed Services, regardless of the need for their skills. The Defense Department desired greater flexibility in calibrating re-enlistment incentives to its manpower needs. The additional expendi-

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[12] "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is . . . [only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan General Equip. Co.* v. *Commissioner*, 297 U. S. 129, 134 (1936). See, *e. g.*, *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 213–214 (1976); *Dixon* v. *United States*, 381 U. S. 68, 74 (1965).

[13] This argument was clearly raised in the briefs in the Court of Appeals, Brief for Plaintiffs-Appellees (Cross-Appellants) 13, *Larionoff* v. *United States*, Nos. 74–1211 and 74–1212, and in this Court, Brief for Respondents 15–18. We therefore do not regard the somewhat inconclusive colloquy at oral argument, see Tr. of Oral Arg. 29–33, as abandoning it.

tures for the VRB were expected to save money in the long run, since payment of the higher re-enlistment bonus would enable the Armed Forces to retain highly skilled individuals whose training had required a considerable investment.[14] Members of Congress in the floor debates clearly recognized the wisdom of offering such incentives.[15]

The VRB was thus intended to induce selected service members to extend their period of service beyond their original enlistment. Of course, the general pay raise for the military included in the same Act was also intended to have a similar effect, by making a military career generally more attractive.[16] But the VRB was expected to be a very specific sort of incentive, not only because it was aimed at a selected group of particularly desirable service members, but also because it offered an incentive "at just the time that it will be most effective, when an individual decides whether or not to reenlist." Remarks of Rep. Nedzi, 111 Cong. Rec. 17201 (1965). The then Secretary of Defense, Robert S. McNamara, made the same point to the House Armed Services Committee, in contrasting the VRB to "proficiency pay," which provides increased pay to service members with critical skills:

> "We believe a more efficient way to provide additional reenlistment incentives to selected first termers in especially high demand is by using a variable reenlistment bonus. *Monetary rewards are thereby concentrated at the first reenlistment decision point, obtaining the greatest return per dollar spent on the retention of personnel.*" Hearings on Military Pay Bills before the House Commit-

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[14] H. R. Rep. No. 549, 89th Cong., 1st Sess., 47 (1965); S. Rep. No. 544, 89th Cong., 1st Sess., 14 (1965).

[15] See, *e. g.*, remarks of Rep. Morton, 111 Cong. Rec. 17206 (1965); remarks of Rep. Bennett, *ibid.*; remarks of Rep. Dole, *id.*, at 17209; remarks of Sen. Russell, *id.*, at 20034.

[16] See, *e. g.*, H. R. Rep. No. 549, *supra*, at 5–6; S. Rep. No. 544, *supra*, at 1–4.

> tee on Armed Services, 89th Cong., 1st Sess., 2545 (June 7, 1965) (House Hearings). (Emphasis added.)

The then Assistant Secretary of Defense, Norman S. Paul, also distinguished the VRB from ordinary pay, stating that with the VRB the military hoped "to cure a separate specific problem by specific means, rather than overall pay." Hearings on Military Pay Increase before the Senate Committee on Armed Services, 89th Cong., 1st Sess., 41 (July 29, 1965) (Senate Hearings). The timing of the VRB was crucial to this intention:

> "At the end of his first term of reenlistment [*sic*] he is trying to make up his mind whether to stay in the military. And we think that the added bonus may push him over the line into staying with us, which is what we want to see happening." *Id.*, at 40.[17]

It is true that in discussing the VRB, Congress focused on the service member who reaches the end of his enlistment, and is faced with the decision "whether or not to *reenlist*." (Emphasis added.) Remarks of Rep. Nedzi, *supra*. But, as Congress has recognized in providing that "[a] member of the [Armed Forces] who extends his enlistment . . . is entitled to the same pay and allowances as though he had reenlisted," 37 U. S. C. § 906, precisely the same reasoning applies to the decision to extend enlistment as to the decision to re-enlist. In either case, the VRB could only be effective as a selective incentive to extension of service if at the time he made his

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[17] The argument that the VRB would be particularly effective as an inducement to re-enlist because it would be provided at the "decision point" is a constant theme through the hearings, the committee reports, and the floor debates. See House Hearings 2545–2584 (statements of Secy. McNamara), 2671 (colloquy of Rep. Stratton and Gen. Greene); Senate Hearings 19 (statement of Secy. McNamara), 26, 40, 44 (statements of Asst. Secy. Paul); H. R. Rep. No. 549, *supra*, at 47; S. Rep. No. 544, *supra*, at 14; 111 Cong. Rec. 17201 (1965) (remarks of Rep. Nedzi).

decision the service member could count on receiving it if he elected to remain in the service.

This is very apparent when the VRB program is examined from the perspective of an individual who is at the point of deciding whether or not to extend an enlistment due to expire at some future date. At the time he makes this decision, he is aware that his rating or expected rating is classified as a critical military skill eligible for a VRB at a particular level. Under the plan as envisioned by Congress, and as applied by the Navy in the case of re-enlistments, the incentive operates "at just the time it will be most effective," because the service member knows that if he remains in the service, he will receive a VRB at the prescribed level. But under the contested regulations, the service member has no such reassurance. Whether or not his rating is eligible for a VRB now, it may not be at the future date on which his first enlistment expires.[18] His "incentive" to extend his enlistment is the purely hypothetical possibility that he might receive a VRB if there is a personnel shortage in his skill on that date. On the other hand, if he nevertheless extends his enlistment, and if the VRB level for his rating is increased in the interval before his original term expires, he will receive a higher award than that which sufficed to induce his decision to remain in the service—from the standpoint of Congress' purposes, a totally gratuitous award.[19]

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[18] Indeed, as the Court of Appeals pointed out, 175 U. S. App. D. C., at 43–44, n. 32, 533 F. 2d, at 1178–1179, n. 32, because the regulations governing the VRB program required the various services to undertake an annual review of the military specialties in which personnel shortages existed for the purpose of adjusting VRB award levels, Department of Defense Directive 1304.14, ¶ IV.F.1, the service member, by his very decision to extend his enlistment, would contribute to the likelihood that by the time his initial enlistment expired, his skill would no longer be in short supply and the VRB he had expected would therefore have been reduced or eliminated.

[19] The effects of the challenged regulations would, of course, be less than

The clear intention of Congress to enact a program that "concentrates monetary incentives at the first reenlistment decision point where the greatest returns per retention dollar can be expected," Senate Hearings 26 (statement of Asst. Secy. Paul), could only be effectuated if the enlisted member at the decision point had some certainty about the incentive being offered. Instead, the challenged regulations provided for a virtual lottery.[20] We therefore hold that insofar as the Defense Department regulations required that the amount of the VRB to be paid to a service member who was otherwise eligible to receive one be determined by the award level as of the time he began to serve his extended enlistment, they are in clear conflict with the congressional intention in enacting the VRB program, and hence invalid. Because Congress intended to provide at the re-enlistment decision point a promise of a reasonably certain and specific bonus for extending service in the Armed Forces, Larionoff and the members of his class are entitled, as the Court of Appeals held, to payment of VRB's determined according to the award levels in effect at the time they agreed to extend their enlistments.

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clear to the service member deciding whether or not to extend his enlistment, and, given the complexity and ambiguity of the regulations, and the resulting possibility that they could be misconstrued by Navy recruiters as well as by the enlistees themselves, it would not be surprising if many service members, like some of the respondents here, see n. 4, *supra*, came to believe that by extending their enlistments they had acquired a vested right to a VRB. To the extent that such beliefs had been fostered, upholding the regulations would perpetrate a considerable injustice.

[20] Of course, the enlisted service member agreeing to extend his enlistment could not have been entirely certain of the amount of his future VRB. First, the VRB was calculated according to a formula based on the amount of the RRB, which in turn depended on the re-enlistee's basic pay upon entering the re-enlistment period. At the time he agreed to extend his enlistment, the service member could not have been sure what that amount would be; Congress could alter military pay scales, or the member might be promoted or demoted, and hence his pay might change,

III

This brings us to the further question of respondent Johnson's entitlement to a VRB. At the time he agreed to extend his enlistment, the VRB program was in effect, and his CTM rating was classified as a critical military skill. Before he began serving the extended enlistment period, however, Congress repealed the RRB and VRB system, and substituted the new SRB. 88 Stat. 119, 37 U. S. C. § 308 (1970 ed., Supp. V). The Government contends that since the VRB had been abolished before Johnson became eligible to receive one, he is not entitled to receive a bonus. The Court of Appeals rejected this argument.[21]

What we have said above as to Larionoff goes far toward answering this question. The intention of Congress in enacting the VRB was specifically to promise to those who

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in the interval. Second, the VRB, by both statute and regulation, was not actually paid until the service member began serving his extended enlistment, and even then was ordinarily paid in yearly installments. If for some reason the enlistee did not complete service of his extension, remaining installments were not paid, and overpayments were recouped. Department of Defense Directive 1304.14, ¶ IV.G. Finally, receipt of any VRB at all depended on the service member's completing the requirements for eligibility before expiration of the original enlistment. See Department of Defense Instruction 1304.15, ¶ V.B.1, n. 8. Thus, the VRB as applied to service members extending their enlistments, as opposed to those re-enlisting, was always somewhat contingent. But there is a significant difference between this sort of contingency, which was inherent in the nature of the program and in any event involved marginal effects on the amount of the award or the occurrence of rather speculative events, and the sort of uncertainty the contested regulations inject into the program, which rendered the primary determinant of the VRB entirely unpredictable at the time the decision to extend enlistment was made.

[21] The decision of the Court of Appeals on this point is in conflict with the decisions in *Collins* v. *Rumsfeld*, 542 F. 2d 1109 (CA9 1976), cert. pending *sub nom. Saylors* v. *United States*, No. 76-677; and *Carini* v. *United States*, 528 F. 2d 738 (CA4 1975), cert. pending, No. 75-1695.

extended their enlistments that a VRB award would be paid to them at the expiration of their original enlistment in return for their commitment to lengthen their period of service.[22] When Johnson made that commitment, by entering an agreement to extend his enlistment, he, like Larionoff, became entitled to receive at some future date a VRB at the award level then in effect (provided that he met the other eligibility criteria). Thus, unless Congress intended, in repealing the VRB program in 1974, to divest Johnson of the rights he had already earned, and constitutionally could do so, the prospective repeal of the program could not affect his right to receive a VRB, even though the date on which the bonus was to be paid had not yet arrived.

Of course, if Congress had such an intent, serious constitutional questions would be presented. No one disputes that Congress may prospectively reduce the pay of members of the Armed Forces, even if that reduction deprived members of benefits they had expected to be able to earn. Cf. *Bell* v. *United States*, 366 U. S. 393 (1961); *United States* v. *Dickerson*, 310 U. S. 554 (1940). It is quite a different matter, however, for Congress to deprive a service member of pay due for services already performed, but still owing. In that case, the congressional action would appear in a different constitutional light. Cf. *Lynch* v. *United States*, 292 U. S. 571 (1934); *Perry* v. *United States*, 294 U. S. 330 (1935). In view of these problems, we would not lightly conclude, in the absence of a clear expression of congressional intent, that in amending 37 U. S. C. § 308 and establishing a new bonus system, Congress intended to affect the rights of those service members who had extended their enlistments and become entitled to receive VRB's.

Nothing in the language of the 1974 Act or its legislative history expresses such an intention. The Act makes no refer-

[22] As noted, n. 20, *supra*, the precise amount of the award remained somewhat uncertain, and the award was contingent on the enlisted member's meeting certain eligibility conditions.

ence whatever to service members who have become entitled to payment of a VRB by extending their enlistments. There is no prohibition of further payments of VRB's to those already entitled to them; [23] the Act simply replaces the old § 308 with a new one that authorizes SRB's rather than RRB's and VRB's. Nor does the legislative history express any intention to effect such a prohibition. No paramount power of the Congress or important national interest justifying interference with contractual entitlements is invoked.

The Courts of Appeals that have upheld the Government's position have relied on two indications of a congressional intent to affect the rights of Johnson and his class. First, the 1974 Act expressly preserves the right of all service members on active duty as of the effective date of the Act to receive upon re-enlistment the RRB's they would have been entitled to before passage of the Act. Pub. L. No. 93–277, § 3,[24] 88

[23] The Government's concession that the 1974 Act does not affect respondents other than Johnson implicitly admits that the Act permits such payments. Three other named respondents entered their two-year extension periods after June 1, 1973. Since the VRB was paid in yearly installments, n. 5, *supra*, these three would presumably still have installments due on their VRB after the Act became effective on June 1, 1974.

[24] This section provides:

"Notwithstanding section 308 of title 37, United States Code, as amended by this Act, a member of a uniformed service on active duty on the effective date of this Act, who would have been eligible, at the end of his current or subsequent enlistment, for the reenlistment bonus prescribed in section 308 (a) or (d) of that title, as it existed on the day before the effective date of this Act, shall continue to be eligible for the reenlistment bonus under that section as it existed on the day before the effective date of this Act. If a member is also eligible for the reenlistment bonus prescribed in that section as amended by this Act, he may elect to receive either one of those reenlistment bonuses. However, a member's eligibility under section 308 (a) or (d) of that title, as it existed on the day before the effective date of this Act, terminates when he has received a total of $2,000 in reenlistment bonus payments, received under either section 308 (a) or (d) of that title as it existed on the day before the effective date of this Act, or under section 308 of that title, as amended by this Act, or from a combination of both."

Stat. 121. The failure to include a similar saving clause as to VRB's, it is argued, indicates that Congress intended to abolish them entirely. But the saving clause for RRB's does not merely preserve them for those who had already extended their enlistments, but assures RRB's upon re-enlistment to any service member then on active duty. The failure to enact a similar provision as to VRB's indicates only that Congress did not intend that VRB's be paid to those service members who re-enlisted after the effective date of the Act, and has no bearing on those who had already extended their enlistments and become entitled to VRB's.

Second, reference is made to a portion of the Conference Report on the Act, indicating a congressional "understanding" that service members, like Johnson, who had already entered two-year extensions of enlistment could become eligible for an SRB by canceling the extension and replacing it with a four-year extension. H. R. Conf. Rep. No. 93–985, pp. 4–5 (1974).[25] This, it is argued, indicates that Congress had

[25] The relevant portion of the Conference Report referred to in the text states:

"Clarification of interpretation of bill language

"The House committee in reporting the bill indicated its intention that bonuses not be authorized for personnel for existing obligated service. There was brought to the attention of the conferees a problem that would exist, particularly in the Navy nuclear-power field, under the House interpretation of the language of the bill. In cases where commitment has been made to a man with a four-year enlistment and a two-year extension he can cancel the two-year extension and reenlist for four years and receive a reenlistment bonus for the four-year reenlistment. The Navy expressed great concern that the language of the bill might be interpreted to require it to abrogate an understanding it had with enlistees and would operate in such a way as to cause serious retention problems in its most critical career field. The conferees, therefore, want it understood that while it normally does not expect bonuses to be paid for services for which there was an existing obligation, it is consistent with the conferees' understanding that full entitlement to SRB will be authorized for personnel who have already agreed to an extension period prior to the

considered the possible unfairness that eliminating the VRB could work on members such as Johnson, and felt that it had made sufficient provision for them by making them eligible, upon a further extension of their commitment, for an SRB. But the Report does not refer to the possible unfairness of eliminating the VRB payable to those service members with whom it deals; rather, it refers to the Navy's concern that language in the legislative history might cast doubt on a commitment the Navy had made "to a man with a four-year enlistment and a two-year extension that he can cancel the two-year extension and reenlist for four years and receive a reenlistment bonus for the four-year reenlistment." *Id.*, at 4. The Report removes any doubts about the validity of that commitment. The only relevance of the Report to the problem before us is that it demonstrates that Congress was responsive to the "concern that the language of the bill might be interpreted to require it to abrogate an understanding" between the Armed Forces and enlistees, *ibid.*, making it less rather than more likely that Congress intended the 1974 Act to abrogate Johnson's entitlement to a VRB by implication.

Affirmed.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, dissenting.

Like the Court, I accept the Government's interpretation of the relevant Navy Department regulations, but I do not agree

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enactment of the legislation if they subsequently cancel this extension prior to its becoming operative and reenlist for a period of at least two years beyond the period of the canceled extension. Nothing in the bill should operate to deny the Chief of Naval Operations the authority to extend SRB entitlement to nuclear-power operators, if they subsequently can cancel any outstanding extension period prior to its becoming operative and reenlist for a period of at least two years beyond the period of the canceled extension."

with the majority's view that because Congress intended by the VRB legislation irrevocably to promise a re-enlistment bonus to those who agreed in advance to re-enlist the regulations are invalid. As I see it, the legislation was not part of the re-enlistment agreement, which was executed in consideration of the pay, allowances, and benefits that would accrue during a continuance of the re-enlistee's service. Those who executed re-enlistment agreements had no vested right in any particular level of pay, in any particular allowance or benefit, or in any particular total package of pay, allowances, or benefits. In this respect, I am in essential agreement with Judge Haynsworth's opinion for the Court of Appeals for the Fourth Circuit in *Carini* v. *United States*, 528 F. 2d 738 (1975), which concluded that cancellation of the VRB prior to the beginning of a re-enlistment period was not forbidden by law. I respectfully dissent.

Reporter's Note

The next page is purposely numbered 901. The numbers between 883 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM APRIL 28 THROUGH JUNE 13, 1977

APRIL 28, 1977

Dismissal Under Rule 60

No. 76–6475. WILSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 546 F. 2d 1175.

MAY 2, 1977

Appeals Dismissed

No. 76–815. APPAWORA *v.* BROUGH. Appeal from Sup. Ct. Utah dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rosebud Sioux Tribe* v. *Kneip,* 430 U. S. 584 (1977). Reported below: 553 P. 2d 934.

No. 76–1279. SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT *v.* DEPARTMENT OF PROPERTY VALUATION OF ARIZONA. Appeal from Sup. Ct. Ariz. dismissed for want of substantial federal question. Reported below: 113 Ariz. 472, 556 P. 2d 1134.

No. 76–6067. DOVE *v.* NEW YORK ET AL. Appeal from D. C. S. D. N. Y. dismissed for want of jurisdiction.

Certiorari Granted—Vacated and Remanded. (See No. 76–815, *supra.*)

Miscellaneous Orders

No. A–445. WHITEHEAD *v.* UNITED STATES. C. A. 5th Cir. Application for bail, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. A–486. HURST *v.* UNITED STATES. C. A. 6th Cir. Application for bail, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. D–89. IN RE DISBARMENT OF AVGERIN. It having been reported to the Court by Peter Victor Pappas, of Chicago, Ill., that Constantine N. Avgerin died February 19, 1977, the rule to show cause heretofore issued on November 15, 1976 [429 U. S. 955], is hereby discharged.

No. D–104. IN RE DISBARMENT OF MURRAY. It is ordered that Richard C. Murray, of Lutherville, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 75–1069. RICHMOND UNIFIED SCHOOL DISTRICT ET AL. *v.* BERG. C. A. 9th Cir. [Certiorari granted, 429 U. S. 1071.] Motion of National Education Assn. for leave to file a brief as *amicus curiae* granted.

No. 75–1157. TOWN OF LOCKPORT, NEW YORK, ET AL. *v.* CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC., ET AL., 430 U. S. 259. Motion of appellees Citizens for Community Action at the Local Level, Inc., et al. for recall of judgment and clarification of remand denied.

No. 76–539. DAYTON BOARD OF EDUCATION ET AL. *v.* BRINKMAN ET AL. C. A. 6th Cir. [Certiorari granted, 429 U. S. 1060.] Motion of the United States for leave to file a brief as *amicus curiae* granted.

No. 76–793. EHRLICHMAN *v.* UNITED STATES; and

No. 76–1081. MITCHELL ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Motion of petitioners for leave to file supplemental memorandum denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this motion.

No. 76–577. ZACCHINI *v.* SCRIPPS-HOWARD BROADCASTING CO. Sup. Ct. Ohio. [Certiorari granted, 429 U. S. 1037.] Motion of National Association of Broadcasters for leave to file a brief as *amicus curiae* denied.

No. 76–1105. CLARK *v.* KIMMITT, SECRETARY OF THE SENATE, ET AL. Appeal from C. A. D. C. Cir.; and

No. 76–1258. TERRITO ET AL. *v.* POCHE ET AL. Appeal from Sup. Ct. La. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

Certiorari Granted

No. 76–1151. UNITED STATES *v.* CECCOLINI. C. A. 2d Cir. Certiorari granted. Reported below: 542 F. 2d 136.

No. 76–1058. CENTRAL ILLINOIS PUBLIC SERVICE CO. *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted and case set for oral argument with No. 76–1095, *Commissioner of Internal Revenue* v. *Kowalski* [certiorari granted, 430 U. S. 944]. Reported below: 540 F. 2d 300.

Certiorari Denied

No. 76–374. SIMS *v.* WALN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 536 F. 2d 686.

No. 76–1003. LONGHI *v.* ESSEX COUNTY PROBATION DEPARTMENT ET AL. Super. Ct. N. J. Certiorari denied.

No. 76–1056. BUDDY SYSTEMS, INC. *v.* EXER-GENIE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 545 F. 2d 1164.

No. 76–1066. NORTHERN COMMERCIAL CO. *v.* SELLS. C. A. 9th Cir. Certiorari denied. Reported below: 544 F. 2d 526.

No. 76–1078. DEVINCENT ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 546 F. 2d 452.

No. 76–1091. ROSE ET AL. *v.* CITY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76–1099. SHORT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 803.

No. 76–1104. SAGRACY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 803.

No. 76–1125. JACK SANDERS CORP. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 211 Ct. Cl. 318, 546 F. 2d 430.

No. 76–1131. ECHOLS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 2d 948.

No. 76–1136. HELSTOSKI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1165.

No. 76–1138. LE BEAU TOURS INTER-AMERICA, INC. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 547 F. 2d 9.

No. 76–1146. B & E PAVING CO. ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied.

No. 76–1167. CRUMPACKER *v.* RUMAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 519.

No. 76–1197. SECURITIES INVESTOR PROTECTION CORP. *v.* MASSACHUSETTS FINANCIAL SERVICES, INC. C. A. 1st Cir. Certiorari denied. Reported below: 545 F. 2d 754.

No. 76–1252. BADDOCK *v.* AMERICAN BENEFIT LIFE INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 544 F. 2d 1291.

No. 76–1255. VITELLO *v.* GAUGHAN, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. Reported below: 544 F. 2d 17.

No. 76–1268. POSTER EXCHANGE, INC. *v.* NATIONAL SCREEN SERVICE CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 2d 255.

No. 76–1260. SMITH *v.* MARTIN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 542 F. 2d 688.

No. 76–1284. AMOCO OIL CO. *v.* OIL, CHEMICAL & ATOMIC WORKERS, INTERNATIONAL UNION, LOCAL 7–1, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 548 F. 2d 1288.

No. 76–1295. FINNEY *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 209 Ct. Cl. 742, 538 F. 2d 347.

No. 76–1366. INDIVIGLIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 549 F. 2d 264.

No. 76–5631. JOSEPH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 533 F. 2d 282.

No. 76–5969. WARHOLIC *v.* UNITED STATES; and
No. 76–6142. RICCARDI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: No. 76–5969, 547 F. 2d 1177; No. 76–6142, 547 F. 2d 1176.

No. 76–6026. WINFORD *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 76–6031. REDDING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 36.

No. 76–6068. SKINNER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 329 So. 2d 405.

No. 76–6075. FIMBRES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76–6076. WIGGINS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 178 U. S. App. D. C. 77, 543 F. 2d 1390.

No. 76–6093. KLARE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 545 F. 2d 93.

No. 76–6096. BRINSON ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 325 So. 2d 447.

No. 76–6099. STREET *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 549 F. 2d 799.

No. 76–6119. HUNT *v.* HAVENER, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 801.

No. 76–6177. VICE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 543 F. 2d 1102.

No. 76–6205. RICHARDSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 909.

No. 76–6240. NOEL *v.* UNITED STATES;
No. 76–6243. EASTER *v.* UNITED STATES;
No. 76–6259. PROCTOR *v.* UNITED STATES; and
No. 76–6269. BRYANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 551 F. 2d 309 and 310.

No. 76–6246. ORZECHOWSKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 547 F. 2d 978.

No. 76–6284. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 583.

No. 76–6361. CHAMBERLAIN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 1296.

No. 76–6363. MAYNARD *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: —— Ill. App. 3d ——, 346 N. E. 2d 235.

No. 76–6368. BLACK *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 116 N. H. 836, 368 A. 2d 1177.

No. 76–6367. GOULD *v.* GAVETT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 551 F. 2d 306.

No. 76–6374. CURTIS ET AL. *v.* TOWNSEND ET UX. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 15 Ill. App. 3d 209, 303 N. E. 2d 566.

No. 76–6378. ZATKO *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 76–6385. SMITH *v.* HEWITT, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 549 F. 2d 796.

No. 76–6414. BREWER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 76–6443. BIRCH ET AL. *v.* CAREY, GOVERNOR OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied.

No. 76–6462. LAIRD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 549 F. 2d 797.

No. 76–6467. YOUNG *v.* HOGAN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 572.

No. 76–6468. HILL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 76–6471. HERNDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 F. 2d 354.

No. 76–6476. MURRAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 76–6487. VITALE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 549 F. 2d 71.

No. 76–6489. DELAMOTTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 76–6490. CHANNEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 76–6495. CHAPMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 1240.

No. 76–6500. PERKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 F. 2d 354.

No. 76–6501. SPANIER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 76–6508. BAAITH, AKA CURTIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 41.

No. 76–6510. MEEKS ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 76–6539. DYER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 76–1219. GRUTKA *v.* BARBOUR, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD, ET AL. C. A. 7th Cir. Motions of General Conference of Seventh-day Adventists and American Baptist Churches in the USA for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 549 F. 2d 5.

No. 76–1249. DAY *v.* AVERY ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 179 U. S. App. D. C. 63, 548 F. 2d 1018.

No. 76–1270. NEW YORK *v.* LUIS J. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE WHITE would grant certiorari. Reported below: 40 N. Y. 2d 990, 359 N. E. 2d 663.

No. 76–6265. GOODWIN *v.* GEORGIA; and

No. 76–6395. COLEMAN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari and vacate judgments insofar as they leave undisturbed the sentences of death. See *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting); *id.*, at 231 (MARSHALL, J., dissenting). Reported below: No. 76–6265, 236 Ga. 339, 223 S. E. 2d 703; No. 76–6395, 237 Ga. 84, 226 S. E. 2d 911.

Rehearing Denied

No. 76–718. MAKRIS *v.* UNITED STATES, 430 U. S. 954;

No. 76–5756. NOLEN *v.* BROWN, SECRETARY OF DEFENSE, ET AL., 429 U. S. 1104; and

No. 76–5985. STEEL *v.* FINE ET AL., 430 U. S. 943. Petitions for rehearing denied.

No. 76–5357. COOPER *v.* UNITED STATES, 429 U. S. 1099. Motion for leave to file petition for rehearing denied.

MAY 12, 1977

Miscellaneous Order

No. A–917. ADDONIZIO *v.* UNITED STATES. Application to vacate order entered May 2, 1977, by the United States Court of Appeals for the Third Circuit, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, granted pursuant to this Court's Rule 49 (3). Order filed April 27, 1977, by the United States District Court for the District of New Jersey is reinstated pending decision of the Court of Appeals of the appeal therefrom. THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST dissent.

MAY 16, 1977

Affirmed on Appeal

No. 76–1076. RAILROAD RETIREMENT BOARD *v.* KALINA. Appeal from C. A. 6th Cir. Motion of appellee for leave to

proceed *in forma pauperis* granted. Judgment affirmed. Reported below: 541 F. 2d 1204.

No. 76–1299. GRAVES ET AL. *v.* MEYSTRIK, DIRECTOR, DIVISION OF EMPLOYMENT SECURITY, ET AL. Affirmed on appeal from D. C. E. D. Mo. MR. JUSTICE BRENNAN would note probable jurisdiction and set case for oral argument. Reported below: 425 F. Supp. 40.

No. 76–6413. WHITFIELD ET AL. *v.* BURNS, COMMISSIONER, DEPARTMENT OF PENSIONS AND SECURITY OF ALABAMA, ET AL. Affirmed on appeal from D. C. M. D. Ala.

Appeals Dismissed

No. 76–1315. CALHOUN *v.* KUPPERMAN ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 76–1321. YORK *v.* DAVIS. Appeal from Sup. Ct. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 237 Ga. 202, 227 S. E. 2d 359.

No. 76–1368. PACIFIC POWER & LIGHT CO. *v.* DEPARTMENT OF REVENUE OF MONTANA. Appeal from Sup. Ct. Mont. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 171 Mont. 334, 558 P. 2d 454.

No. 76–1328. ANDREW CATAPANO CO., INC., ET AL. *v.* NEW YORK CITY FINANCE ADMINISTRATION. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 40 N. Y. 2d 1074, 360 N. E. 2d 934.

No. 76–6034. POTTER *v.* DEPARTMENT OF SOCIAL SERVICES. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Reported below: 61 Cal. App. 3d 310, 132 Cal. Rptr. 5.

Vacated and Remanded on Appeal

No. 75–1079. SCHANEFELT *v.* PARADISO. Appeal from Sup. Ct. N. M. Judgment vacated and case remanded for further consideration in light of *Califano* v. *Goldfarb*, 430 U. S. 199 (1977), and *Trimble* v. *Gordon*, 430 U. S. 762 (1977).

No. 75–1148. LALLI *v.* LALLI, ADMINISTRATRIX. Appeal from Ct. App. N. Y. Judgment vacated and case remanded for further consideration in light of *Trimble* v. *Gordon*, 430 U. S. 762 (1977). Reported below: 38 N. Y. 2d 77, 340 N. E. 2d 721.

No. 75–1610. PENDLETON *v.* PENDLETON ET AL. Appeal from Sup. Ct. Ky. Judgment vacated and case remanded for further consideration in light of *Trimble* v. *Gordon*, 430 U. S. 762 (1977). Reported below: 531 S. W. 2d 507.

Certiorari Dismissed

No. 76–1016. WARDEN, GREEN HAVEN STATE PRISON *v.* PALERMO. C. A. 2d Cir. The Court is advised that respondent was found dead at John F. Kennedy Airport, N. Y., on March 25, 1977. The petition for certiorari is therefore dismissed. *Dove* v. *United States*, 423 U. S. 325 (1976). Reported below: 545 F. 2d 286.

Miscellaneous Orders

No. ———. MARK TRAIL CAMPGROUNDS, INC. *v.* FIELD ENTERPRISES, INC., ET AL. Ct. App. Ga. Motion of Mark Trail Campgrounds, Inc., for leave to proceed *in forma pauperis* denied.

No. 36, Orig. TEXAS *v.* LOUISIANA. For the purpose of giving effect to the opinion of this Court announced on June 14, 1976, 426 U. S. 465, decree entered, *ante*, p. 161. Costs to be taxed to the parties in accordance with their contribution to the fund established by the Special Master, and no costs to be taxed for the services of the Special Master. Any unexpended funds contributed by the parties to the Special Master for necessary expenses to be returned to the parties. Upon such return of funds the Honorable Robert Van Pelt, Special Master appointed in this cause, will have completed his duties and is thereupon discharged.

No. D–67. IN RE DISBARMENT OF MEYER. Disbarment entered. [For earlier order, see 429 U. S. 914.]

No. D–74. IN RE DISBARMENT OF FOSTER. Disbarment entered. [For earlier order, see 429 U. S. 936.]

No. D–87. IN RE DISBARMENT OF COHEN. Disbarment entered. [For earlier order, see 429 U. S. 955.]

No. D–88. IN RE DISBARMENT OF NOWAK. Disbarment entered. [For earlier order, see 429 U. S. 955.]

No. D–97. IN RE DISBARMENT OF DEUTSCH. Disbarment entered. [For earlier order, see 429 U. S. 1069.]

No. D–105. IN RE DISBARMENT OF SALTZER. It is ordered that Leonard Saltzer, of Cleveland, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–106. IN RE DISBARMENT OF ABBOTT. It is ordered that William Hayes Abbott of Orangevale, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why

he should not be disbarred from the practice of law in this Court.

No. D–107. IN RE DISBARMENT OF FRIEDLAND. It is ordered that Edward S. Friedland of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–108. IN RE DISBARMENT OF ZEIGLER. It is ordered that Charles D. Zeigler, of Youngstown, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 76–6544. MCALLISTER *v.* MAGGIO, WARDEN; and
No. 76–6606. DARNER *v.* MALLEY, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 76–6474. TYLER *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted

No. 76–682. SANTA CLARA PUEBLO ET AL. *v.* MARTINEZ ET AL. C. A. 10th Cir. Motions of Shoshone and Arapahoe Tribes of the Wind River Indian Reservation et al., Seneca Nation of Indians of New York et al., and Pueblo de Cochiti et al. for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 540 F. 2d 1039.

Certiorari Denied. (See also Nos. 76–1315, 76–1321, and 76–1368, *supra*.)

No. 76–507. LEIPZIG ET AL. *v.* BALDWIN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 540 F. 2d 1360.

No. 76–525. SCHANBARGER *v.* MCNULTY, SHERIFF. C. A. 2d Cir. Certiorari denied. Reported below: 542 F. 2d 1165.

No. 76–972. STATE BOARD OF MEDICINE OF IDAHO ET AL. *v.* JONES ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 97 Idaho 859, 555 P. 2d 399.

No. 76–1048. 75.81 ACRES OF LAND, MORE OR LESS, SITUATE IN GRAYSON COUNTY, VIRGINIA, ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 76–1062. O'BRIEN ET AL. *v.* JORDAN. C. A. 1st Cir. Certiorari denied. Reported below: 544 F. 2d 543.

No. 76–1071. MARTINEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1165.

No. 76–1085. TELEPHONE ANSWERING SERVICE CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 546 F. 2d 423.

No. 76–1115. HOFSTAD *v.* UNITED STATES; and
No. 76–1135. CARLSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 547 F. 2d 1346.

No. 76–1152. KAVALER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 76–1161. NATIONAL MOTOR FREIGHT TRAFFIC ASSN., INC., ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 178 U. S. App. D. C. 77, 543 F. 2d 1390.

No. 76–1175. STRASBURG REALTY, INC. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 546 F. 2d 422.

No. 76–1186. COHEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 544 F. 2d 781.

No. 76–1190. FASSNACHT ET UX. *v.* SPECTER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 416.

No. 76–1196. CONFEDERATION OF POLICE ET AL. *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 539 F. 2d 712.

No. 76–1205. AMERICAN AIRLINES, INC., ET AL. *v.* WORLD AIRWAYS, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 178 U. S. App. D. C. 398, 547 F. 2d 695.

No. 76–1214. BURGDORF *v.* BOARD OF TRUSTEES OF WOODLAND JOINT UNIFIED SCHOOL DISTRICT ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 76–1238. FREDEMAN ET AL. *v.* UNITED STATES. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 547 F. 2d 1156.

No. 76–1251. FORD MOTOR CO. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 547 F. 2d 954.

No. 76–1263. FIRST NATIONAL BANK OF CHICAGO *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 546 F. 2d 759.

No. 76–1264. TABER INSTRUMENT CORP. ET AL. *v.* RAAB. C. A. 2d Cir. Certiorari denied. Reported below: 546 F. 2d 522.

No. 76–1276. EDWARDS *v.* WARDEN, KENTUCKY STATE PENITENTIARY. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 800.

No. 76–1277. MARYLAND *v.* JONES. Ct. App. Md. Certiorari denied. Reported below: 279 Md. 1, 367 A. 2d 1.

No. 76–1278. ADAMS ET AL. *v.* FEDERAL EXPRESS CORP. C. A. 6th Cir. Certiorari denied. Reported below: 547 F. 2d 319.

No. 76–1289. MARKER ET AL. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 178 U. S. App. D. C. 277, 546 F. 2d 1043.

No. 76–1306. LAMONT *v.* FRESHMAN, MARANTZ, COMSKY & DEUTSCH ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76–1307. NAVAJO FREIGHT LINES, INC. *v.* VACCO INDUSTRIES. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 63 Cal. App. 3d 262, 133 Cal. Rptr. 628.

No. 76–1312. WILD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 179 U. S. App. D. C. 232, 551 F. 2d 418.

No. 76–1317. MOUNT *v.* BOSTON ATHENAEUM. C. A. 1st Cir. Certiorari denied. Reported below: 530 F. 2d 961.

No. 76–1318. SAULS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 291 N. C. 253, 230 S. E. 2d 390.

No. 76–1320. JENSEN *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 76–1323. FOSTER *v.* KINGDON. Sup. Ct. Ga. Certiorari denied. Reported below: 238 Ga. 37, 230 S. E. 2d 855.

No. 76–1326. GAINES *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 27 Ore. App. 69, 555 P. 2d 469.

No. 76–1330. DOE *v.* PRINGLE ET AL., JUSTICES. C. A. 10th Cir. Certiorari denied. Reported below: 550 F. 2d 596.

No. 76–1332. ANASTOS ET AL. *v.* O'BRIEN, EXECUTRIX, ET AL. Sup. Ct. Ill. Certiorari denied.

No. 76–1331. NORBECK *v.* DAVENPORT COMMUNITY SCHOOL DISTRICT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 545 F. 2d 63.

No. 76–1335. TYLER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 342 So. 2d 574.

No. 76–1338. DIANA ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 48 Ohio St. 2d 199, 357 N. E. 2d 1090.

No. 76–1341. RICHTER *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 15 Wash. App. 1038, — P. 2d —.

No. 76–1347. MARTIN SWEETS CO., INC. *v.* JACOBS. C. A. 6th Cir. Certiorari denied. Reported below: 550 F. 2d 364.

No. 76–1348. LEAMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 148.

No. 76–1350. GARIBALDI ET AL. *v.* CANVIN, ADMINISTRATRIX, ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 76–1353. KUYKENDALL *v.* SOUTHERN FARM BUREAU CASUALTY INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 543 F. 2d 754.

No. 76–1379. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 809.

No. 76–1409. VILLARREAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 1145.

No. 76–1420. STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA ET AL. *v.* ARTHUR ANDERSEN & CO. ET AL. C. A. 2d Cir. Certiorari denied.

No. 76–1433. BUTLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 538 F. 2d 898.

No. 76–1461. WARE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 550 F. 2d 524.

No. 76–1465. PACHECO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 891.

No. 76–5613. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 1241.

No. 76–6089. ROGERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 549 F. 2d 490.

No. 76–6120. WALLACE *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 76–6122. DEEM *v.* UNITED STATES; and
No. 76–6324. DEEM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 802.

No. 76–6126. BLANTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 547 F. 2d 1168.

No. 76–6138. BLACKWELL *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 278 Md. 466, 365 A. 2d 545.

No. 76–6144. CLARK *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 65 Ill. 2d 169, 357 N. E. 2d 798.

No. 76–6150. MONTECALVO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 545 F. 2d 684.

No. 76–6183. TENNANT *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 65 Ill. 2d 401, 358 N. E. 2d 1116.

No. 76–6184. GELFAND *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 76–6188. CLAYTON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 541 F. 2d 486.

No. 76–6203. TRZCINSKI *v.* UNITED STATES; and
No. 76–6242. CIMASZEWSKI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: No. 76–6203, 553 F. 2d 851; No. 76–6242, 547 F. 2d 1165.

No. 76–6212. PRICE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 330.

No. 76–6224. MCCOY ET AL. *v.* UNITED STATES; and
No. 76–6225. VAUGHN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 539 F. 2d 1050.

No. 76–6228. SILKMAN *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 543 F. 2d 1218.

No. 76–6233. JOHNSON ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 76–6236. HOWARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 802.

No. 76–6247. SHADD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 76–6255. BRUGGER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 549 F. 2d 2.

No. 76–6260. CAVAZOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 167.

No. 76–6262. WATSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 76–6266. CALDWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 802.

No. 76–6277. MORGAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 363 A. 2d 999.

No. 76–6286. SEGAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 1293.

No. 76–6287. HALL *v.* BUREAU OF EMPLOYMENT AGENCIES. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 76–6293. DOE ET AL. *v.* BURNS, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF IOWA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 545 F. 2d 1101.

No. 76–6313. SANTANA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 549 F. 2d 797.

No. 76–6315. LOWENBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 809.

No. 76–6317. JOE *v.* NIXON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 426.

No. 76–6328. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 548 F. 2d 665.

No. 76–6329. ROBINSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 549 F. 2d 805.

No. 76–6336. GUNTER ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 546 F. 2d 861.

No. 76–6348. MIDDLETON *v.* UNITED STATES; and
No. 76–6353. TOTARO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 550 F. 2d 957.

No. 76–6355. VANDYGRIFT *v.* TURLINGTON, COMMISSIONER, DEPARTMENT OF EDUCATION OF FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 76–6381. MASSEY *v.* LOCKHART, CORRECTION SUPERINTENDENT. C. A. 8th Cir. Certiorari denied. Reported below: 547 F. 2d 1172.

No. 76–6387. REECE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 76–6392. MUNCASTER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied.

No. 76-6393. TYLER *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 76-6397. BOYD *v.* RODRIGUEZ, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 76-6399. ROBERTS *v.* LEEKE, CORRECTIONS DIRECTOR, ET AL. C. A. 4th Cir. Certiorari denied.

76-6402. CROSS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 544 S. W. 2d 436.

No. 76-6405. JOHNSON *v.* RYAN, GENESEE COUNTY PAROLE AGENT. C. A. 6th Cir. Certiorari denied. Reported below: 547 F. 2d 1167.

No. 76-6412. YOUNGER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 76-6416. JOE *v.* WARNER BROS., INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 76-6417. REID *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 114 Ariz. 16, 559 P. 2d 136.

No. 76-6425. PHILLIPS *v.* CRISP, WARDEN. Ct. Crim. App. Okla. Certiorari denied.

No. 76-6426. HERMAN *v.* FLORIDA. Dist Ct. App. Fla., 4th Dist. Certiorari denied.

No. 76-6431. KARKENNY *v.* POTOMAC BUILDING CORP. Ct. App. D. C. Certiorari denied. Reported below: 364 A. 2d 809.

No. 76-6444. MOODY *v.* MOODY. Sup. Ct. Ga. Certiorari denied. Reported below: 237 Ga. 374, 228 S. E. 2d 788.

No. 76-6446. RASBERRY *v.* J. C. PENNEY, GREENBRIAR. C. A. 5th Cir. Certiorari denied. Reported below: 540 F. 2d 1083.

No. 76-6447. DAWSON *v.* REVERCOMB, JUDGE, ET AL. Ct. App. D. C. Certiorari denied.

No. 76-6449. HOOPER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 76-6451. THOMPSON *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 76-6453. HENSLEY *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 801.

No. 76-6454. GLOVER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 557 P. 2d 922.

No. 76-6457. MILLS *v.* STATE BOARD OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 1296.

No. 76-6461. ALO *v.* HAWAII. Sup. Ct. Hawaii. Certiorari denied. Reported below: 57 Haw. 418, 558 P. 2d 1012.

No. 76-6469. LEE *v.* DAVIS, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 76-6472. SOLIS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 167.

No. 76-6478. HINES *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 76-6488. HARTSOCK *v.* BORDENKIRCHER, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 76-6493. HUDSON ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 76-6502. ANDERSON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 76-6503. BERTOLINI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 76–6514. HUDSON *v.* UNITED STATES; and
No. 76–6526. JARDAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 549 F. 2d 517.

No. 76–6517. CRAWFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 76–6524. JAMES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 76–6554. DUDLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 76–6556. KNOWLIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 553 F. 2d 97.

No. 76–6557. ALTENBURGER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 702.

No. 76–6560. FRENCH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 547 F. 2d 1169.

No. 76–6564. RENTFROW *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 76–6565. GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 76–6566. MERRIWEATHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 551 F. 2d 314.

No. 76–6567. DAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 551 F. 2d 233.

No. 76–6576. SULLIVAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 76–6599. WARDLAW *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 76–6601. PIZIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 891.

No. 76–6604. CONTRERAS-PEREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 551 F. 2d 313.

No. 76–6607. DAVENPORT *v.* UNITED MUTUAL LIFE INSURANCE CO. C. A. 2d Cir. Certiorari denied. Reported below: 546 F. 2d 528.

No. 76–931. STOPS ET UX. *v.* LITTLE HORN STATE BANK. Sup Ct. Mont. Motion of Crow Tribe for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 170 Mont. 510, 555 P. 2d 211.

No. 76–989. UNITED STATES *v.* MAYES. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 537 F. 2d 1080.

No. 76–1300. NEW MEXICO *v.* HUDSON. Sup. Ct. N. M. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 89 N. M. 759, 557 P. 2d 1108.

No. 76–1052. PRUDENTIAL INSURANCE COMPANY OF AMERICA ET AL. *v.* NATIONAL ORGANIZATION FOR WOMEN, WASHINGTON, D. C. CHAPTER, ET AL. Petition for certiorari before judgment to C. A. D. C. Cir. Certiorari denied. Applications for stay denied without prejudice to parties to request stays from the United States Court of Appeals for the District of Columbia Circuit pending appeal to that court.

No. 76–1192. BROWN, SECRETARY OF DEFENSE, ET AL. *v.* WESTINGHOUSE ELECTRIC CORP. ET AL. C. A. 4th Cir. Motion of Reuben B. Robertson III for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 542 F. 2d 1190.

No. 76–1275. ESTELLE, CORRECTIONS DIRECTOR *v.* GILL. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 544 F. 2d 1336.

No. 76–1250. VELSICOL CHEMICAL CORP. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. D. C. Cir. Motions of Manufacturing Chemists Assn. and National Agricultural Chemicals Assn. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 179 U. S. App. D. C. 43, 548 F. 2d 998.

No. 76–1285. NEW YORK *v.* TESTA ET AL. Ct. App. N. Y. Motion of respondent Eugene Riggio for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 40 N. Y. 2d 1018, 359 N. E. 2d 1367.

No. 76–1305. SIMS *v.* VIRGINIA ELECTRIC & POWER CO. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 550 F. 2d 929.

No. 76–6235. COOPER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari and vacate judgment insofar as it leaves undisturbed the sentence of death. See *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting); *id.*, at 231 (MARSHALL, J., dissenting). Reported below: 336 So. 2d 1133.

Rehearing Denied

No. 74–1263. BREWER, WARDEN *v.* WILLIAMS, 430 U. S. 387;

No. 75–1053. JONES, DIRECTOR, DEPARTMENT OF WEIGHTS AND MEASURES, RIVERSIDE COUNTY *v.* RATH PACKING CO., 430 U. S. 519;

No. 76–689. MITCHELL *v.* UNITED STATES, 430 U. S. 945;

No. 76–892. FLOREA ET AL. *v.* UNITED STATES, 430 U. S. 945;

No. 76–1038. ALLEN ET AL. *v.* AUSTIN, SECRETARY OF STATE OF MICHIGAN, ET AL., 430 U. S. 924; and

No. 76–1050. CAPLAN *v.* HOWARD ET AL., 430 U. S. 932. Petitions for rehearing denied.

No. 76–1065. McIntosh *v.* Anaheim Union High School District et al., 430 U. S. 941;

No. 76–1089. Margoles *v.* Johns et al., 430 U. S. 946;

No. 76–5940. Cognato *v.* United States; 430 U. S. 956;

No. 76–6039. Adams *v.* United States, 430 U. S. 957;

No. 76–6103. Boulware *v.* Texas, 430 U. S. 959;

No. 76–6178. O'Briain, aka O'Brien *v.* California, 430 U. S. 958;

No. 76–6274. Tarkowski *v.* Bartlett et al., 430 U. S. 973; and

No. 76–6371. Lamar et al. *v.* United States, 430 U. S. 959. Petitions for rehearing denied.

No. 74–701. Economy Finance Corp. et al. *v.* United States, 420 U. S. 947. Motion for leave to file second petition for rehearing denied. Mr. Justice Stevens took no part in the consideration or decision of this motion.

No. 76–927. Rifkin *v.* United States, 429 U. S. 1098; and

No. 76–5955. Frazier *v.* United States, 429 U. S. 1078. Motions for leave to file petitions for rehearing denied.

May 23, 1977

Affirmed on Appeal

No. 76–889. Maloney, Commissioner of Children and Youth Services of Connecticut *v.* Lady Jane et al. Appeal from D. C. Conn. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment affirmed. Reported below: 420 F. Supp. 318.

Appeals Dismissed

No. 76–1365. Redmond *v.* Wheeler et al. Appeal from Ct. App. Ky. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 76–6494. CAMERON *v.* CAIN ET AL. Appeal from Sup. Ct. Ala. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 295 Ala. 164, 325 So. 2d 157.

Miscellaneous Orders

No. ———. PENN CENTRAL CO. ET AL. *v.* U. S. RAILWAY ASSN. ET AL. Sp. Ct., R. R. R. R. A. Motions of the United States and United States Railway Assn. to dismiss appeals granted. Appeals dismissed.* *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 177 (1944).

No. A–930. EXXON CORP. *v.* FEDERAL TRADE COMMISSION ET AL.;

No. A–931. KERR-MCGEE CORP. *v.* FEDERAL TRADE COMMISSION ET AL.; and

No. A–932. UNION CARBIDE CORP. *v.* FEDERAL TRADE COMMISSION ET AL. Applications for stay pending appeal to the United States Court of Appeals for the District of Columbia Circuit, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of these applications.

No. 76–1349. MAHER, COMMISSIONER OF SOCIAL SERVICES OF CONNECTICUT, ET AL. *v.* BUCKNER ET AL. Appeal from D. C. Conn. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

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*[REPORTER'S NOTE: In addition to Penn Central Co., the following lodged notices of appeal with the Clerk of this Court: Trustees of Penn Central Transportation Co.; Trustee of Erie Lackawanna Railway Co.; Trustee of Lehigh & Hudson River Railway Co.; Trustee of Ann Arbor Railroad Co.; Trustee of Lehigh Valley Railroad Co.; Trustees of Reading Co.; Intervening Penn Central Lienholders; Trustee of New York, New Haven & Hartford Railroad Co.; and Trustee of Central Railroad Company of New Jersey.]

No. A-967. CENTRAL SOUTH CAROLINA CHAPTER, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, ET AL. *v.* MARTIN, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL. Application for stay of execution and enforcement of paragraphs one through four of order entered by the United States District Court for the District of South Carolina on May 31, 1976, in *United States* v. *Gasque*, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant application.

No. 76-6314. OWENS *v.* MEANOR, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted

No. 76-1137. FULMAN ET AL., TRUSTEES *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted. Reported below: 545 F. 2d 268.

No. 76-1359. BANKERS TRUST CO. *v.* MALLIS ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 568 F. 2d 824.

No. 76-1234. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. *v.* ROSS ET AL. C. A. 4th Cir.; and

No. 76-1261. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. *v.* ABRAMS ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 76-1234, 544 F. 2d 514; No. 76-1261, 547 F. 2d 1062.

No. 76-1310. HOUCHINS, SHERIFF *v.* KQED, INC., ET AL. C. A. 9th Cir. Certiorari granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 546 F. 2d 284.

Certiorari Denied. (See also Nos. 76–1365 and 76–6494, *supra.*)

No. 76–1109. FOSTER GRANT CO., INC. *v.* ILLINOIS TOOL WORKS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 547 F. 2d 1300.

No. 76–1122. PARISI ET AL. *v.* LOUISIANA. Crim. Dist. Ct. of La., Parish of Orleans. Certiorari denied.

No. 76–1126. SHERIDAN *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 247 N. W. 2d 232.

No. 76–1130. DeSALVATORE, AKA PIZZA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 76–1141. GRIGSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 802.

No. 76–1210. BALLESTRASSE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 809.

No. 76–1215. JACOBS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 543 F. 2d 18.

No. 76–1239. SCHULTZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 803.

No. 76–1240. WANEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 1181.

No. 76–1245. ALBAUGH *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 549 F. 2d 798.

No. 76–1246. EMERSON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 1297.

No. 76–1257. CHRYSLER CREDIT CORP. *v.* MEYERS ET AL.; and

No. 76–1352. MEYERS *v.* CHRYSLER CREDIT CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 539 F. 2d 511.

No. 76–1265. NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC., ET AL. *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 178 U. S. App. D. C. 277, 546 F. 2d 1043.

No. 76–1343. SAIKEN *v.* BENSINGER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 546 F. 2d 1292.

No. 76–1355. PENTHOUSE INTERNATIONAL, LTD., ET AL. *v.* RANCHO LA COSTA, INC., ET AL. Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 76–1398. FLETCHER *v.* FLORIDA PUBLISHING CO. Sup. Ct. Fla. Certiorari denied. Reported below: 340 So. 2d 914.

No. 76–1463. APRIL INDUSTRIES, INC. *v.* BJORK ET AL. Sup. Ct. Utah. Certiorari denied. Reported below: 560 P. 2d 315.

No. 76–1469. SPEROW ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 551 F. 2d 808.

No. 76–1472. PRIVITERA ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 1317.

No. 76–1497. SANCHEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 76–6163. FROMIN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 540 F. 2d 846.

No. 76–6174. GITTENS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1165.

No. 76–6190. MORGAN *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 40 Ill. App. 3d 711, 352 N. E. 2d 444.

No. 76–6191. PIERCE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 238 Ga. 126, 231 S. E. 2d 744.

No. 76-6263. YOUNG *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 15 Wash. App. 581, 550 P. 2d 689.

No. 76-6281. OGDEN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 76-6299. ROBERTS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 548 F. 2d 665.

No. 76-6301. CARPENTER *v.* SOUTH DAKOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 536 F. 2d 759.

No. 76-6304. BROWN *v.* RUBIERA, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 539 F. 2d 470.

No. 76-6307. WIGGINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 76-6323. ELLSWORTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 1096.

No. 76-6343. BEASLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 572.

No. 76-6369. SNEBOLD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 428.

No. 76-6383. WANZER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 178 U. S. App. D. C. 410, 547 F. 2d 707.

No. 76-6403. DUMEUR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 551 F. 2d 309.

No. 76-6415. LEE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 549 F. 2d 797.

No. 76-6428. JENKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 544 F. 2d 180.

No. 76-6448. GREEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 549 F. 2d 797.

No. 76–6482. ARCHIE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 341 So. 2d 107.

No. 76–6492. CHIARELLO *v.* FOGG, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 76–6498. VENNER *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 279 Md. 47, 367 A. 2d 949.

No. 76–6499. TATUM *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 76–6505. LOMBARDO *v.* HANDLER ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 178 U. S. App. D. C. 277, 546 F. 2d 1043.

No. 76–6509. HURST *v.* FIKE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 76–6531. RAITPORT *v.* GENERAL MOTORS CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1163.

No. 76–6574. RIXNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 F. 2d 1224.

No. 76–6580. BODEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 1383.

No. 76–6598. PADILLA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 76–6614. STEWART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 F. 2d 528.

No. 76–6619. FRANCOEUR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 891.

No. 76–6620. MOSES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 556 F. 2d 568.

No. 76–6625. GHALAYINI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 932.

No. 76–6641. GOLDSTONE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 76–6648. GENES ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 76–793. EHRLICHMAN *v.* UNITED STATES; and

No. 76–1081. MITCHELL ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of these petitions. Reported below: 181 U. S. App. D. C. 254, 559 F. 2d 31.

No. 76–1316. BEAL, SECRETARY, DEPARTMENT OF PUBLIC WELFARE OF PENNSYLVANIA, ET AL. *v.* BRODERICK, U. S. DISTRICT JUDGE. C. A. 3d Cir. Application for stay of participation of the United States in *Halderman* v. *Pennhurst*, C. A. No. 74–1345 (ED Pa.), presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, denied. Certiorari denied.

No. 76–1356. MERCEDES-BENZ OF NORTH AMERICA, INC., ET AL. *v.* LINK ET AL. C. A. 3d Cir. Certiorari and other relief denied. Reported below: 550 F. 2d 860.

No. 76–6507. MCDONALD *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari and all other relief denied.

No. 76–6326. LIVINGSTON *v.* TEXAS. Ct. Crim. App. Tex.;

No. 76–6401. GRANVIEL *v.* TEXAS. Ct. Crim. App. Tex.; and

No. 76–6407. HARRIS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari and vacate judgments insofar as they leave undisturbed the sentences of death. See *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting); *id.*, at 231 (MARSHALL, J., dissenting). Reported below: No. 76–6326, 542 S. W. 2d 655; No. 76–6401, 552 S. W. 2d 107; No. 76–6407, 237 Ga. 718, 230 S. E. 2d 1.

No. 76–1362. COMMUNITY LOAN & INVESTMENT CORPORATION OF FULTON COUNTY *v.* JONES. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 544 F. 2d 1228.

Rehearing Denied

No. 76–188. GOURLEY, DIRECTOR, DIVISION OF FAMILY SERVICES OF MISSOURI, ET AL. *v.* LEWIS, 430 U. S. 940;

No. 76–996. POMPONIO *v.* UNITED STATES, 430 U. S. 966;

No. 76–5972. LIPSCOMB *v.* UNITED STATES, 430 U. S. 970; and

No. 76–6404. CALHOUN *v.* UNITED STATES, 430 U. S. 974. Petitions for rehearing denied.

No. 76–5834. ROSENFELD *v.* UNITED STATES, 430 U. S. 941. Motion for leave to file petition for rehearing denied.

MAY 31, 1977

Affirmed on Appeal

No. 76–1386. COUNTRY-WIDE INSURANCE CO. *v.* HARNETT, SUPERINTENDENT OF INSURANCE OF NEW YORK. Affirmed on appeal from D. C. S. D. N. Y. MR. JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: 426 F. Supp. 1030.

No. 76–6542. COSTARELLI *v.* PANORA, REGISTRAR OF MOTOR VEHICLES. Affirmed on appeal from D. C. Mass. Reported below: 423 F. Supp. 1309.

Appeals Dismissed

No. 76–1259. PONDER *v.* LOUISIANA STATE BAR ASSN. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. Reported below: 340 So. 2d 134.

No. 76–6322. CAHNMANN *v.* ECKERTY, CITY CLERK OF URBANA. Appeal from App. Ct. Ill., 4th Dist., dismissed for want of substantial federal question. Reported below: 40 Ill. App. 3d 180, 351 N. E. 2d 580.

No. 76–1397. KANSAS CITY *v.* DARBY. Appeal from Sup. Ct. Mo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE WHITE dissents and would set case for oral argument. Reported below: 544 S. W. 2d 529.

No. 76–1454. PEARSON *v.* OKLAHOMA. Appeal from Ct. Crim. App. Okla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 556 P. 2d 1025.

Certiorari Granted—Vacated and Remanded

No. 76–1447. MURRAY ET AL. *v.* WAGLE. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U. S. 274 (1977). MR. JUSTICE MARSHALL and MR. JUSTICE STEVENS would deny certiorari. Reported below: 546 F. 2d 1329.

Miscellaneous Orders

No. A–936. HIRSCH, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD *v.* CAULFIELD ET AL. D. C. E. D. Pa. Motion of respondents to vacate stay heretofore granted by MR. JUSTICE BRENNAN on May 19, 1977, denied.

No. A–981 (76–1081). MITCHELL ET AL. *v.* UNITED STATES, *ante*, p. 933. Application for suspension of effect of order denying certiorari, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this application.

No. D–96. IN RE DISBARMENT OF HOFFMANN. Disbarment entered. [For earlier order, see 430 U. S. 926.]

No. D–99. IN RE DISBARMENT OF COOK. Disbarment entered. [For earlier order, see 430 U. S. 962.]

No. D–109. IN RE DISBARMENT OF SPECKMAN. It is ordered that George Raymond Speckman of Plattsburg, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–110. IN RE DISBARMENT OF CRUZE. It is ordered that Chester Thomas Cruze of Cincinnati, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 75–536. NASHVILLE GAS CO. *v.* SATTY. C. A. 6th Cir. [Certiorari granted, 429 U. S. 1071.] Motion of AFL–CIO et al. for leave to file a brief as *amici curiae* granted.

No. 76–678. SHELL OIL CO. *v.* DARTT. C. A. 10th Cir. [Certiorari granted, 429 U. S. 1089.] Motion of Equal Employment Advisory Council for leave to file a brief as *amicus curiae* granted. Reported below: 539 F. 2d 1256.

No. 76–1576. HELMS ET AL. *v.* VANCE, SECRETARY OF STATE, ET AL. C. A. D. C. Cir. Motion of petitioners to expedite consideration of petition for writ of certiorari denied.

Probable Jurisdiction Noted

No. 75–1690. PARHAM, COMMISSIONER, DEPARTMENT OF HUMAN RESOURCES OF GEORGIA, ET AL. *v.* J. L. ET AL. Appeal from D. C. M. D. Ga. Motion of appellee J. R. for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. In addition to the questions presented by the jurisdictional statement, parties are directed to brief and argue the following question: "Whether, where the parents of a minor voluntarily place the minor in a state institution, there is sufficient 'state action,' including subsequent action by the state institution, to implicate the Due Process Clause of the

Fourteenth Amendment?" Reported below: 412 F. Supp. 112.

No. 76–6372. QUILLOIN *v.* WALCOTT ET VIR. Appeal from Sup. Ct. Ga. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 238 Ga. 230, 232 S. E. 2d 246.

Certiorari Granted

No. 76–1193. UNITED STATES *v.* JACOBS, AKA "MRS. KRAMER." C. A. 2d Cir. Certiorari granted. Reported below: 547 F. 2d 772.

Certiorari Denied. (See also Nos. 76–1397 and 76–1454, *supra.*)

No. 75–1013. BRONCUCIA *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 189 Colo. 334, 540 P. 2d 1101.

No. 76–274. LOUIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 538 F. 2d 342.

No. 76–992. FULLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 519.

No. 76–1124. GEDRA *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 76–1160. ALLIED MILLS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 177 U. S. App. D. C. 270, 543 F. 2d 417.

No. 76–1176. GOLDBERG *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 2d Cir. Certiorari denied. Reported below: 546 F. 2d 477.

No. 76–1177. SWAINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 548 F. 2d 657.

No. 76–1223. SPRAGUE *v.* FITZPATRICK. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 560.

No. 76–1280. LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO, LOCAL No. 720 *v.* MARSHALL, SECRETARY OF LABOR. C. A. 10th Cir. Certiorari denied. Reported below: 547 F. 2d 525.

No. 76–1281. CHURCHILL FOREST INDUSTRIES (MANITOBA), LTD., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 3d Cir. Certiorari denied. Reported below: 548 F. 2d 109.

No. 76–1293. SILVERMAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 553 F. 2d 94.

No. 76–1325. NARD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 549 F. 2d 797.

No. 76–1333. BEER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied.

No. 76–1374. PALMERI *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 44 Ill. App. 3d 69, 358 N. E. 2d 86.

No. 76–1381. OLDENDORF *v.* LOPEZ ET AL.; and

No. 76–1391. HOFFMAN RIGGING & CRANE SERVICE, INC. *v.* LOPEZ ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 545 F. 2d 836.

No. 76–1384. UNIROYAL, INC., ET AL. *v.* JAVELIN CORP. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 276.

No. 76–1387. LEPPKE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 559 P. 2d 459.

No. 76–1392. EXHIBITORS POSTER EXCHANGE, INC. *v.* NATIONAL SCREEN SERVICE CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 543 F. 2d 1106.

No. 76–1395. SMITH *v.* SHAFER ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 38 Ill. App. 3d 217, 347 N. E. 2d 292.

No. 76–1401. SECURITY STORAGE COMPANY OF WASHINGTON ET AL. *v.* DISTRICT UNEMPLOYMENT COMPENSATION BOARD. Ct. App. D. C. Certiorari denied. Reported below: 365 A. 2d 785.

No. 76–1406. THORNTON ET AL. *v.* PERSONAL SERVICE INSURANCE CO. Sup. Ct. Ohio. Certiorari denied. Reported below: 48 Ohio St. 2d 306, 358 N. E. 2d 579.

No. 76–1442. A. G. SPALDING & BROS., INC., ET AL. *v.* PAUL SULLIVAN SPORTS, INC. C. A. 1st Cir. Certiorari denied. Reported below: 553 F. 2d 91.

No. 76–1446. COLE *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 76–1501. INGRAHM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 551 F. 2d 314.

No. 76–1513. CZARNECKI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 552 F. 2d 698.

No. 76–1530. BENSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 548 F. 2d 42.

No. 76–6064. JEFFERSON *v.* UNITED STATES;
No. 76–6298. BARNES *v.* UNITED STATES;
No. 76–6409. FOX *v.* UNITED STATES;
No. 76–6459. HEARN *v.* UNITED STATES; and
No. 76–6480. BAYNES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1164.

No. 76–6231. CHOCHREK *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 26 Ore. App. 643, 552 P. 2d 1353.

No. 76–6253. WHITNEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 76–6283. BARRY *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 330 So. 2d 512.

No. 76–6289. HOMBURG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 1350.

No. 76–6300. WARREN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 76–6303. BILES *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 338 So. 2d 1004.

No. 76–6308. WADE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 212 Ct. Cl. 593, 553 F. 2d 104.

No. 76–6325. GARRISON *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 540 F. 2d 1271.

No. 76–6341. LA VIOLETTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 551 F. 2d 314.

No. 76–6346. ISAACSON *v.* PERINI. C. A. 6th Cir. Certiorari denied. Reported below: 546 F. 2d 424.

No. 76–6373. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 551 F. 2d 314.

No. 76–6375. GWYNN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 553 F. 2d 94.

No. 76–6390. COLLINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 549 F. 2d 557.

No. 76–6398. SEIFFERT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 F. 2d 354.

No. 76–6423. GOFF *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 76–6458. BAXTER *v.* CORNETT, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 908.

No. 76–6491. BALL *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 547 F. 2d 78.

No. 76–6504. WHARFF *v.* WARNER. Sup. Ct. Iowa. Certiorari denied.

No. 76–6515. HUGHES *v.* AULT, COMMISSIONER, DEPARTMENT OF OFFENDER REHABILITATION OF GEORGIA. C. A. 5th Cir. Certiorari denied.

No. 76–6518. KNIGHTEN *v.* BRODERICK. Sup. Ct. Miss. Certiorari denied. Reported below: 331 So. 2d 907.

No. 76–6519. GRIFFIN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 76–6520. AKRIDGE *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 457.

No. 76–6521. JONES *v.* HADICAN. C. A. 8th Cir. Certiorari denied. Reported below: 552 F. 2d 249.

No. 76–6527. GUELKER *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 548 S. W. 2d 521.

No. 76–6529. YOCUM *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 66 Ill. 2d 211, 361 N. E. 2d 1369.

No. 76–6534. LEE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 340 So. 2d 1339.

No. 76–6535. TURNBOUGH *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 551 F. 2d 202.

No. 76–6537. STEVENS ET AL. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 76–6540. RAITPORT *v.* DODD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1163.

No. 76–6541. STAGE *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 801.

No. 76–6543. LEE *v.* EWING, COLE, ERDMAN & EUBANK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 549 F. 2d 795.

No. 76–6550. CLARK *v.* PAYNE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 76–6551. HAUGEN *v.* TAYLOR ET AL. Sup. Ct. Nev. Certiorari denied.

No. 76–6555. GRIFFIN *v.* TEXAS EMPLOYMENT COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 1296.

No. 76–6563. AMARANTE-JORDAN *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Sup. Ct. Cal. Certiorari denied.

No. 76–6623. JOHNSTON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 282.

No. 76–6635. TURNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 551 F. 2d 780.

No. 76–6650. MONTGOMERY *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 801.

No. 76–6658. MEERT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 547 F. 2d 1170.

No. 76–6662. ZARATTINI ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 552 F. 2d 753.

No. 76–6663. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 549 F. 2d 797.

No. 76–6664. WORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 76–6679. DELGADO-LOMELI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 1283.

No. 76–6683. THOMAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 76–6687. VALLE-SALAZAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 428.

No. 76–6689. TAGLIONE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 139 and 550 F. 2d 243.

No. 76–6691. BENNETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 1235.

No. 76–6695. JACKSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 76–6699. BONNER *v.* WARDEN, STATEVILLE CORRECTIONAL CENTER. C. A. 7th Cir. Certiorari denied. Reported below: 553 F. 2d 1091.

No. 76–1116. NEW YORK *v.* EARL. Ct. App. N. Y. Certiorari denied. Reported below: 40 N. Y. 2d 941, 358 N. E. 2d 1037.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, dissenting.

Shortly after midnight on September 13, 1970, Jessee Carter, an off-duty New York City police officer, was driving through the South Jamaica section of Queens on his way home from a movie. His suspicion was aroused when he observed two individuals, later identified as respondent and a companion, "crouched" behind a parked automobile in a partially deserted, unfenced hotel parking lot. The two were approximately 15 to 20 feet from Carter, and he noted that respondent was holding an object in his upraised hand. Respondent's companion was also holding an object, which Carter saw him

place in his rear trouser pocket. Carter was unable to identify either of these objects.

The officer then drove his automobile onto the parking lot, stopping approximately two car lengths from the suspects. He turned off his headlights and observed them briefly. He then turned his lights back on and drove his car toward the men. He jumped from the car with his badge in one hand and his drawn revolver in the other, and shouted "Freeze—police officer."

Respondent rose from his crouched position, and Carter saw him drop the object he had been holding which turned out to be a fully loaded .38-caliber revolver. Officer Carter immediately placed the men under arrest, and proceeded to search them. He found six .38-caliber bullets in respondent's pocket and a loaded revolver in the pocket of his companion. Respondent was charged with possession of weapons and dangerous instruments and appliances. His motion to suppress the handgun as evidence was denied by the New York Supreme Court Criminal Term. Respondent then pled guilty to the charge, and, as permitted by New York law,[1] he appealed his conviction, charging that the motion to suppress should have been granted.

The Supreme Court Appellate Division affirmed respondent's conviction in an opinion joined by four justices. One justice dissented. The court first determined that Officer Carter "was clearly possessed of such information as would warrant a 'founded suspicion' that criminal activity was 'afoot.'" 50 App. Div. 2d 289, 293, 377 N. Y. S. 2d 649, 653 (1975). He was therefore held entitled to make further inquiry and to take such precautions as reasonably necessary for his safety. The court further held that Officer Carter's action exhibiting his badge and gun and asserting his authority was reasonable under the circumstances. Accordingly, it concluded that respondent's handgun was properly seized and

[1] See generally *Lefkowitz* v. *Newsome*, 420 U. S. 283 (1975).

that the trial court had correctly denied respondent's motion to suppress.

The New York Court of Appeals reversed the conviction, with two judges dissenting. 40 N. Y. 2d 941, 358 N. E. 2d 1037 (1976). In a brief unsigned order it adopted the opinion of the dissenting member of the Appellate Division.[2] The State filed a timely petition for writ of certiorari, seeking review of the Court of Appeals' decision.

In *Terry* v. *Ohio*, 392 U. S. 1 (1968), in an opinion by Mr. Chief Justice Warren, the Court recognized that a police officer has limited authority to make investigatory stops of individuals engaged in suspicious behavior which does not rise to the level of probable cause to make an arrest.[3] *Id.*, at 22. The *Terry* Court further held that, in conducting the investigation, the officer could properly take whatever action was reasonably necessary to assure his safety and the safety of others. The propriety of such police conduct—"necessarily swift action predicated upon the on-the-spot observations of the officer"—is not to be tested by a rigid probable-cause standard, but rather by the "Fourth Amendment's general proscription against unreasonable searches and seizures." *Id.*, at 20 (footnote omitted).

Terry establishes a two-pronged test for determining the propriety of this type of conduct: "[1] whether the officer's action was justified at its inception, and [2] whether it was reasonably related in scope to the circumstances which justi-

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[2] References to the New York Court of Appeals' opinion will therefore be understood to refer to the dissenting opinion in the Appellate Division. The New York Court of Appeals' final action was clearly based on federal constitutional law, not state law.

[3] This rationale was further elaborated in *Adams* v. *Williams*, 407 U. S. 143, 145 (1972), where we stated:

"The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape."

fied the interference in the first place." *Ibid.* Under the first prong of the *Terry* analysis, it is clear that Officer Carter possessed sufficient facts "to conclude in light of his experience that criminal activity may be afoot." *Id.*, at 30. When the officer observed two individuals in a semideserted hotel parking lot "crouching" behind an automobile holding objects which could well have been weapons, he would have been grossly derelict in his duty to ignore what he saw.[4] In that setting—New York City at midnight—it would have been irrational for a police officer to fail to make further inquiry since the conduct of the two men gave rise to a reasonable suspicion that they might be involved in illegal activity.[5] The closeup observation by the officer neither confirmed his suspicions nor removed them. In light of these "specific and articulable facts," *id.*, at 21, and "the specific reasonable inferences which [Officer Carter was] entitled to draw from the facts in light of his experience," *id.*, at 27, it was entirely proper to conduct an investigatory stop to determine whether criminal activity was afoot. As Mr. Chief Justice Warren observed as to an analogous "suspicious" situation in *Terry:* "It would have been poor police work indeed . . . to have failed to investigate [respondent's] behavior further." *Id.*, at 23.

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[4] As stated by MR. JUSTICE STEWART, "[a] policeman has a duty to investigate suspicious circumstances, and the circumstance of a person wandering the streets late at night without apparent lawful business may often present the occasion for police inquiry." *Palmer* v. *City of Euclid*, 402 U. S. 544, 546 (1971) (concurring).

[5] The opinion of the New York court suggests that respondent might have been holding a tire iron and was crouched behind the automobile because he was in the process of changing a "flat." However, as the Appellate Division majority pointed out, "[t]he record fails to reveal those normal incidents of everyday life which we have come to associate with changing a tire (i. e., the raised or lopsided car, the bumper-jack, and the upraised trunk lid)." 50 App. Div. 2d 289, 293, 377 N. Y. S. 2d 649, 654 (1975).

Once the officer approached the suspects for investigatory purposes, there came into play "the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." *Ibid.*; see *Adams* v. *Williams*, 407 U. S. 143, 146 (1972). The *Terry* opinion stated:

> "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." 392 U. S., at 24.

The defensive measure sanctioned in *Terry* was a pat-down "frisk" of the suspect, *i. e.*, a detailed manual exterior probe of the subject's clothing and body, to assure that a weapon was not being concealed and to remove any weapon found. Mr. Chief Justice Warren's opinion for the Court acknowledged this was "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment," *id.*, at 17. Nevertheless, the Court held this to be a reasonable response to the danger inherent in a face-to-face encounter with a potentially armed and dangerous individual in the narrowly defined circumstances postulated in *Terry*. *Id.*, at 27.[6]

Of course, Officer Carter's conduct in this case was "intrusive." An individual confronted in the middle of the

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[6] The Court stated in *Terry*:

"The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." 392 U. S., at 27. That test is amply met in the case before us.

night by a police officer holding a handgun and ordering him to "freeze" suffers an affront to his liberty and dignity—interests protected by the Fourth Amendment. But this is precisely what the Court balanced in *Terry*. The intrusion here was plainly within the contemplation of *Terry* and was justified by the circumstances confronting Officer Carter. Traveling in his private car, not equipped with a radio phone, he faced two possibly armed persons in a deserted parking lot, in the middle of the night. Under these circumstances it would have been foolhardy for Officer Carter to act less decisively than he did.

The holding of the New York Court of Appeals puts an officer of the law in Carter's position to a difficult choice indeed. He must either ignore what he sees and what his training and experience tell him he should investigate, thereby permitting the possible completion of criminal conduct for which the suspects may be preparing, or he may approach the suspect without preparing for the very danger which materialized here, thereby risking his life.[7] The holding of the Court in *Terry* introduced a long overdue element of common sense and rationality into this area of the law; it ought to be followed here. Surely, the Constitution does not require police officers to make the unhappy choice between dereliction of duty and risk of death. With the dissent of the New York Court of Appeals, I "do not believe that the Fourth Amendment's proscription against unreasonable searches and seizures requires officers in Carter's stead to risk their lives

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[7] Respondent suggests that "[o]f course, Officer Carter, like any other citizen, would have had the right to satisfy his curiosity by addressing questions to defendant." Brief in Opposition 6. Of course, no citizen or policeman in his right mind would have approached respondent and his companion as he would a tourist in Times Square at high noon merely to satisfy idle curiosity. Officer Carter, unlike ordinary citizens, had a sworn duty to investigate such suspicious behavior, and was acting pursuant to such duty when he approached the suspects. His conduct should be commended, not reproached.

needlessly in the performance of their duty." 50 App. Div. 2d, at 294, 377 N. Y. S. 2d, at 654.

This Court cannot, of course, give plenary consideration to every erroneous holding, and I have no doubt that limitations of time and a crowded docket weigh heavily in the decision denying review. In my view, however, where the departure from prior law is as clear as in the instant case, and where the issue is so squarely presented by the petition for certiorari and the response, the matter could be easily resolved in a summary fashion, without the necessity for lengthy briefing and oral argument. See, *e. g.*, *United States* v. *Morrison*, 429 U. S. 1 (1976). I would therefore grant the petition for certiorari, and reverse the judgment because on the face of the record the Court of Appeals has clearly failed to follow the holding in *Terry* and other relevant cases.

No. 76–1376. ROHAUER ET AL. *v.* KILLIAM SHOWS, INC., ET AL. C. A. 2d Cir. Motion of Authors League of America, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 551 F. 2d 484.

No. 76–1493. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 552 F. 2d 817.

No. 76–6114. MOORE *v.* TEXAS ET AL. Ct. Crim. App. Tex.; and

No. 76–6497. FLOYD *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 76–6114, 542 S. W. 2d 664; No. 76–6497, 233 Ga. 280, 210 S. E. 2d 810.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would vacate the death sentences in these cases.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Seventh Circuit from September 26, 1977, to September 30, 1977, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

JUNE 1, 1977

Dismissal Under Rule 60

No. 76–6584. HOLMES *v.* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT. Motion for leave to file petition for writ of mandamus dismissed under this Court's Rule 60.

JUNE 6, 1977

Affirmed on Appeal

No. 76–1105. CLARK *v.* KIMMITT, SECRETARY OF THE SENATE, ET AL. Affirmed on appeal from C. A. D. C. Cir. MR. JUSTICE BLACKMUN, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS would dismiss the appeal for want of jurisdiction, treat the papers whereon the appeal was taken as a petition for writ of certiorari, and deny certiorari. Reported below: 182 U. S. App. D. C. 21, 559 F. 2d 642.

Appeals Dismissed

No. 76–1202. INTERNATIONAL-STANLEY CORP. *v.* DEPARTMENT OF REVENUE OF ILLINOIS ET AL. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of substantial federal question. Reported below: 40 Ill. App. 3d 397, 352 N. E. 2d 272.

No. 76–1220. MARTZ *v.* PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, BUREAU OF TRAFFIC SAFETY. Appeal from Commw. Ct. Pa. dismissed for want of substantial federal question. Reported below: 24 Pa. Commw. 26, 354 A. 2d 266.

No. 76–1422. SHANAHAN *v.* RITTENHOUSE, PROSECUTOR OF HUNTERDON COUNTY. Appeal from Super. Ct. N. J. dismissed for want of substantial federal question.

No. 76–1292. OCEANIC CALIFORNIA, INC. *v.* NORTH CENTRAL COAST REGIONAL COMMISSION ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 63 Cal. App. 3d 57, 133 Cal. Rptr. 664.

Certiorari Granted—Vacated and Remanded

No. 75–220. LOCAL 223, UTILITY WORKERS UNION OF AMERICA *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL.;

No. 75–221. LOCAL 17, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL.;

No. 75–239. STAMPS ET AL. *v.* DETROIT EDISON CO. ET AL.; and

No. 75–393. DETROIT EDISON CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *International Brotherhood of Teamsters* v. *United States, ante,* p. 324. Reported below: 515 F. 2d 301.

No. 75–781. TEAMSTERS FREIGHT, TANK LINE & AUTOMOBILE INDUSTRY EMPLOYEES, LOCAL NO. 988 *v.* SABALA ET AL.;

No. 75–788. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. *v.* SABALA ET AL.; and

No. 76–1060. WESTERN GILLETTE, INC. *v.* SABALA ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *International Brotherhood of Teamsters* v. *United States, ante,* p. 324. Reported below: 516 F. 2d 1251.

No. 75–720. LEE WAY MOTOR FREIGHT, INC., ET AL. *v.* RESENDIS ET AL.; and YELLOW FREIGHT SYSTEM, INC. *v.* HERRERA ET AL., 425 U. S. 991. Petition for rehearing granted and order of May 24, 1976, vacated. Certiorari granted, judgments vacated, and case remanded for further consideration in light of *East Texas Motor Freight System, Inc.* v. *Rodriguez, ante,* p. 395.

No. 76–838. UNION CARBIDE CORP., CONSUMER PRODUCTS DIVISION *v.* NANCE. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *International Brotherhood of Teamsters* v. *United States, ante,* p. 324. Reported below: 540 F. 2d 718.

Miscellaneous Orders

No. 67, Orig. IDAHO EX REL. EVANS, GOVERNOR OF IDAHO, ET AL. *v.* OREGON ET AL. It is ordered that the Honorable Jean Sala Breitenstein, Senior Judge for the United States Court of Appeals for the Tenth Circuit, is appointed Special Master in this case with authority to fix the time and conditions for filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court. [For earlier orders herein, see, *e. g.*, 429 U. S. 163.]

No. 74–6593. GARDNER *v.* FLORIDA, 430 U. S. 349. Motion of respondent for reduction of costs denied.

No. 76–1117. PELTZMAN *v.* KAUFMAN, CHIEF JUDGE, U. S. COURT OF APPEALS. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted

No. 76–1159. QUERN, ACTING DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. *v.* MANDLEY ET AL.; and

No. 76–1416. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* MANDLEY ET AL. C. A. 7th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 545 F. 2d 1062.

No. 76–1334. BORDENKIRCHER, PENITENTIARY SUPERINTENDENT *v.* HAYES. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 547 F. 2d 42.

Certiorari Denied. (See also No. 76–1292, *supra.*)

No. 75–1644. DRASSENOWER ET AL. *v.* LEVINE, INDUSTRIAL COMMISSIONER OF NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 38 N. Y. 2d 771, — N. E. 2d —.

No. 76–824. NANCE *v.* UNION CARBIDE CORP., CONSUMER PRODUCTS DIVISION. C. A. 4th Cir. Certiorari denied. Reported below: 540 F. 2d 718.

No. 76–986. NETELKOS ET AL. *v.* UNITED STATES; and

No. 76–1134. GAMAREKIAN ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 420.

No. 76–999. COE ET AL. *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. Certiorari before judgment to C. A. D. C. Cir. denied.

No. 76–1185. HOMER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 545 F. 2d 864.

No. 76–1198. MCCLUNG *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 76–1199. BOINEAU *v.* SOUTH CAROLINA REAL ESTATE COMMISSION. Sup. Ct. S. C. Certiorari denied. Reported below: 267 S. C. 574, 230 S. E. 2d 440.

No. 76–1211. BULK TERMINALS CO. ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 65 Ill. 2d 31, 357 N. E. 2d 430.

No. 76–1262. GANNET *v.* FIRST NATIONAL STATE BANK OF NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 1072.

No. 76–1266. NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC., ET AL. *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.; and

No. 76–1304. WAGSHAL *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: No. 76–1266, 179 U. S. App. D. C. 154, 551 F. 2d 340; No. 76–1304, 178 U. S. App. D. C. 237, 546 F. 2d 1003.

No. 76–1271. HOOPES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 545 F. 2d 721.

No. 76–1314. KILPATRICK ET AL. *v.* UNITED STATES; and

No. 76–1360. JACKSON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 544 F. 2d 242.

No. 76–1329. BROWN ET AL. *v.* BRYAN ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 339 So. 2d 577.

No. 76–1358. HANDY HARDWARE WHOLESALE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 2d 935.

No. 76–1367. HYSTER CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 807.

No. 76–1404. DOWNEY *v.* CALLERY ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 338 So. 2d 937.

No. 76–1408. PAUL *v.* GAMMAGE. Sup. Ct. Tex. Certiorari denied. Reported below: 548 S. W. 2d 1.

No. 76–1414. SHAND *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied.

No. 76–1417. WIGLESWORTH *v.* TEAMSTERS LOCAL UNION No. 592 ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 552 F. 2d 1027.

No. 76–1424. RICHARDSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 76–1425. MAURICE A. GARBELL, INC., ET AL. *v.* BOEING CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 297.

No. 76–1426. SMITH *v.* CARTER. C. A. 5th Cir. Certiorari denied. Reported below: 545 P. 2d 909.

No. 76–1429. BRADLEY ET AL. *v.* WHITTEN. Sup. Ct. Va. Certiorari denied.

No. 76–1430. GIBSON PRODUCTS, INC., OF RICHARDSON *v.* TEXAS. Sup. Ct. Tex. Certiorari denied. Reported below: 545 S. W. 2d 128.

No. 76–1431. HOBBY *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 76–1436. SPRAGUE & RHODES COMMODITY CORP. ET AL. *v.* THE IRISH SPRUCE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 548 F. 2d 56.

No. 76–1452. LOCKEWILL, INC. *v.* UNITED STATES SHOE CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 547 F. 2d 1024.

No. 76–1485. BIGELOW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 809.

No. 76–1534. MOBILE HOME CITY OF CHATTANOOGA, INC., ET AL. *v.* HAMILTON COUNTY. Ct. App. Tenn. Certiorari denied. Reported below: 552 S. W. 2d 86.

No. 76–1569. ABEL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 F. 2d 591.

No. 76–1603. MENDOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 952.

No. 76–6251. FLAMMIA *v.* UNITED STATES; and
No. 76–6256. COLLINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 76–6252. SANDERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 547 F. 2d 1037.

No. 76–6267. CORPUS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 2d 573.

No. 76–6297. LOVELL *v.* FEDERAL DEPOSIT INSURANCE CORP. ET AL. C. A. 1st Cir. Certiorari denied.

No. 76–6318. NEWKIRK, AKA SMITH *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 32 Md. App. 621, 363 A. 2d 637.

No. 76–6335. WALLSCHLEGER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 76–6382. GREENIDGE *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1160.

No. 76–6340. COOK *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 76–6408. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 76–6432. LIPSCOMB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 547 F. 2d 1168.

No. 76–6442. HOLLAND *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 76–6452. LELAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 76–6464. REGAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 553 F. 2d 98.

No. 76–6538. HUSTON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 76–6562. ARNOLD ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 76–6577. GOUDEAU *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76–6578. DAVIS *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 460.

No. 76–6582. SHINDER *v.* APPELLATE DEPARTMENT OF THE SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 76–6583. FRANCO *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 544 S. W. 2d 533.

No. 76–6587. SEABOCK ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76–6590. RUSSELL *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 560 P. 2d 1003.

No. 76–6588. EDMONDS *v.* LEWIS, INSTITUTION SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 546 F. 2d 566.

No. 76–6594. HARRISON *v.* BENTON, CORRECTIONS DIRECTOR, ET AL. C. A. 10th Cir. Certiorari denied.

No. 76–6595. HARDEE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 55 App. Div. 2d 858, 390 N. Y. S. 2d 768.

No. 76–6596. ADAMS *v.* MINNESOTA. Dist. Ct. Minn., 1st Jud. Dist. Certiorari denied.

No. 76–6600. EDNEY *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 76–6602. RODRIGUEZ *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 551 F. 2d 301.

No. 76–6605. MASSEY *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS. C. A. 8th Cir. Certiorari denied.

No. 76–6609. CROSS *v.* CHURCH, COUNTY CLERK-RECORDER, SAN MATEO COUNTY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 426.

No. 76–6613. MCDONALD *v.* DAVIDSON COUNTY ELECTION COMMISSION ET AL. Certiorari before judgment to C. A. 6th Cir. denied.

No. 76–6647. ALLEY *v.* DODGE HOTEL ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 179 U. S. App. D. C. 256, 551 F. 2d 442.

No. 76–6677. BELL *v.* PUTMAN, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 548 F. 2d 749.

No. 76–6700. TALMAGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 1072.

No. 76–6701. HEAD *v.* UNITED STATES BOARD OF PAROLE. C. A. 7th Cir. Certiorari denied. Reported below: 553 F. 2d 22.

No. 76–6704. MAHON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 549 F. 2d 1198.

No. 76–6708. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 F. 2d 545.

No. 76–6713. WALTON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 552 F. 2d 1354.

No. 76–6715. CLAYBROOKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 553 F. 2d 97.

No. 76–6716. BRAUNIG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 553 F. 2d 777.

No. 76–6719. BELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 76–6722. BURKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 806.

No. 76–6727. YOUNG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 553 F. 2d 1132.

No. 76–6728. SAILER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 552 F. 2d 213.

No. 76–1183. ROBB ET AL. *v.* KENNEDY. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 547 F. 2d 408.

No. 76–1394. ALABAMA *v.* CANTRELL. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE POWELL would grant certiorari. Reported below: 546 F. 2d 652.

No. 76–1212. SCIBELLI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 549 F. 2d 222.

No. 76–1438. CATAMORE ENTERPRISES, INC. *v.* INTERNATIONAL BUSINESS MACHINES CORP. C. A. 1st Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 548 F. 2d 1065.

No. 76–6571. WOODKINS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 542 S. W. 2d 855.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would vacate the death sentence in this case.

Rehearing Granted. (See No. 75–720, *supra.*)

Rehearing Denied

No. 75–1301. DELAWARE TRIBAL BUSINESS COMMITTEE ET AL. *v.* WEEKS ET AL., 430 U. S. 73;

No. 75–1335. ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE ET AL. *v.* WEEKS ET AL., 430 U. S. 73;

No. 75–1495. ANDRUS, SECRETARY OF THE INTERIOR, ET AL. *v.* WEEKS ET AL., 430 U. S. 73;

No. 76–1090. COOK *v.* UNITED STATES, 430 U. S. 983;

No. 76–1213. WOODS *v.* UNITED STATES, 430 U. S. 969;

No. 76–5933. FILMON *v.* FLORIDA, 430 U. S. 980;

No. 76–6181. SELLMAN *v.* UNITED STATES, 430 U. S. 972;

No. 76–6272. SWEETWINE *v.* WARDEN, MARYLAND PENITENTIARY, 430 U. S. 973; and

No. 76–6354. DOBBS *v.* GEORGIA, 430 U. S. 975. Petitions for rehearing denied.

No. 76–6395. COLEMAN *v.* GEORGIA, *ante*, p. 909. Petition for rehearing denied.

No. 76–833. MORROW *v.* GREYHOUND LINES, INC., 429 U. S. 1095. Petition for rehearing and other relief denied.

No. 76–5815. ZANNIS *v.* UNITED STATES, 430 U. S. 934; and

No. 76–6167. BUSTELL *v.* BUSTELL, 430 U. S. 925. Motions for leave to file petitions for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Fifth Circuit in the case of *Willis* v. *American Bar Assn.*, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

JUNE 13, 1977

Affirmed on Appeal

No. 76–675. SENDAK, ATTORNEY GENERAL OF INDIANA, ET AL. *v.* NIHISER, DBA MOVIELAND DRIVE-IN THEATER. Affirmed on appeal from D. C. N. D. Ind. MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST would vacate judgment and remand case for further consideration in light of *Trainor* v. *Hernandez*, *ante*, p. 434. Reported below: See 405 F. Supp. 482.

No. 76–1203. SOWERWINE, TRUSTEE IN BANKRUPTCY *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. S. D. N. Y. MR. JUSTICE STEWART, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS would dismiss the appeal for want of jurisdiction. Reported below: 427 F. Supp. 1157.

Appeal Dismissed

No. 76–6633. MCDONALD *v.* PURITY DAIRIES EMPLOYEES FEDERAL CREDIT UNION ET AL. Appeal from Sup. Ct. Tenn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 76-6483. BATTLE *v.* UNITED STATES. C. A. 10th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Upon representation of the Solicitor General set forth in his memorandum for the United States, filed May 24, 1977, judgment vacated, and case remanded to the United States District Court for the Western District of Oklahoma for further consideration in light of the position presently asserted by the Government. MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST dissent.

Miscellaneous Orders

No. A-916. COLLIS *v.* KENTUCKY. Sup. Ct. Ky. Application for bail, presented to MR. JUSTICE STEVENS, and by him referred to the Court, denied.

No. D-111. IN RE DISBARMENT OF CHAPMAN. It is ordered that Gerald McNamara Chapman of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-112. IN RE DISBARMENT OF CAIN. It is ordered that Kenneth R. Cain, of Ozark, Ala., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 76-528. CONSUMERS POWER CO. *v.* AESCHLIMAN ET AL. C. A. D. C. Cir. [Certiorari granted, 429 U. S. 1090.] Motion of U. S. Labor Party for leave to file a brief as *amicus curiae* granted. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 76-1167. CRUMPACKER *v.* RUMAN ET AL., *ante*, p. 904. Motion of respondents to assess damages denied.

No. 76–864. CITY OF LAFAYETTE, LOUISIANA, ET AL. *v.* LOUISIANA POWER & LIGHT CO. C. A. 5th Cir. [Certiorari granted, 430 U. S. 944.] Motion of National Rural Electric Cooperative Assn. et al. for leave to file a brief as *amici curiae* granted.

No. 76–938. FEDERAL MARITIME COMMISSION ET AL. *v.* PACIFIC MARITIME ASSN. ET AL. C. A. D. C. Cir. [Certiorari granted, 430 U. S. 905.] Motion of Wolfsburger Transport-Gesellschaft m. b. H. for leave to file a brief as *amicus curiae* granted.

No. 76–1057. KEY ET AL. *v.* DOYLE ET AL. Appeal from Ct. App. D. C. [Probable jurisdiction postponed, 430 U. S. 929.] Motion of American Jewish Congress for leave to file a brief as *amicus curiae* granted.

No. 76–1172. FIRST NATIONAL BANK OF BOSTON ET AL. *v.* BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. [Probable jurisdiction postponed, 430 U. S. 964.] Motions of Pacific Legal Foundation, New England Council, and Chamber of Commerce of the United States of America for leave to file briefs as *amici curiae* granted.

No. 76–1200. CRIST, WARDEN, ET AL. *v.* CLINE ET AL. Appeal from C. A. 9th Cir. [Probable jurisdiction postponed, 430 U. S. 982.] Motion of appellees for divided argument granted. Motion of appellee Cline for appointment of counsel granted, and it is ordered that W. William Leaphart, Esquire, of Helena, Mont., is appointed to serve as counsel for appellee Cline in this case. Motion of appellee Bretz for leave to proceed *in forma pauperis* granted.

No. 76–1464. UNIVERSITY OF CHICAGO AND ARGONNE *v.* MCDANIEL. C. A. 7th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 76–5325. BROWDER *v.* DIRECTOR, DEPARTMENT OF CORRECTIONS OF ILLINOIS. C. A. 7th Cir. [Certiorari granted, 429 U. S. 1072.] Motion of Chicago Council of Lawyers for additional time to participate in oral argument as *amicus curiae* denied.

No. 76–5856. HOLLOWAY ET AL. *v.* ARKANSAS. Sup. Ct. Ark. Motion of Robert Alston Newcomb, Esquire, to permit Joseph H. Purvis, Esquire, to argue *pro hac vice* granted.

No. 76–1419. RATCLIFF *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS. Motion for leave to file petition for writ of mandamus denied.

No. 76–6710. JOHNSON *v.* WOOD, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 76–1450. LANDMARK COMMUNICATIONS, INC. *v.* VIRGINIA. Appeal from Sup. Ct. Va. Probable jurisdiction noted. Reported below: 217 Va. 699, 233 S. E. 2d 120.

Certiorari Granted

No. 76–5729. OLIPHANT *v.* SUQUAMISH INDIAN TRIBE ET AL.; and BELGARDE *v.* SUQUAMISH INDIAN TRIBE ET AL. Certiorari (first case) and certiorari before judgment (second case) to C. A. 9th Cir. Motion of the Governor of the State of Washington for leave to file a brief as *amicus curiae* granted. Motion of respondents to strike brief filed by Kitsap County as *amicus curiae* denied. Motion of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 544 F. 2d 1007 (first case).

No. 76–6528. BURKS *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 547 F. 2d 968.

Certiorari Denied. (See also No. 76–6633, *supra.*)

No. 75–1772. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 533 F. 2d 1387.

No. 75–1882. CARTER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 2d 1255.

No. 75–6648. WILLIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 1351.

No. 75–6682. HOPKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 529 F. 2d 775.

No. 75–6811. LATHAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 531 F. 2d 955.

No. 76–344. COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASOC, AFL–CIO *v.* CHANCE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 534 F. 2d 993.

No. 76–387. ROSENBARGER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 536 F. 2d 715.

No. 76–969. HOUSE ET AL. *v.* WALLACE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 538 F. 2d 1138.

No. 76–1165. ZOLLER & DANNEBERG EXPLORATION, LTD., ET AL. *v.* BALLARD & CORDELL CORP. C. A. 10th Cir. Certiorari denied. Reported below: 544 F. 2d 1059.

No. 76–1187. RALEY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 32 Md. App. 515, 363 A. 2d 261.

No. 76–1221. INDUSTRIAL EMPLOYERS & DISTRIBUTORS ASSN. ET AL. *v.* SMITH. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 314.

No. 76–1227. HAWAIIAN HAULING SERVICE CO., LTD. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 545 F. 2d 674.

No. 76–1242. CASE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 555 P. 2d 619.

No. 76–1248. FAVROT *v.* BARNES. Sup. Ct. La. Certiorari denied. Reported below: 339 So. 2d 843.

No. 76–1283. CALESNICK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 549 F. 2d 797.

No. 76–1288. WITTENBRINK ET AL. *v.* COLORADO, BY AND ON BEHALF OF THE CITY OF THORNTON. Sup. Ct. Colo. Certiorari denied. Reported below: 556 P. 2d 1217.

No. 76–1290. ADHESIVES & SEALANT COUNCIL, INC., ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 178 U. S. App. D. C. 276, 546 F. 2d 1042.

No. 76–1313. HOWARD *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 63 Cal. App. 3d 249, 131 Cal. Rptr. 689.

No. 76–1324. ALLSTATE INSURANCE CO. *v.* CANNATA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 76–1351. W. W. WINDLE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. Reported below: 550 F. 2d 43.

No. 76–1354. ANGLE, DBA KANSAS REFINED HELIUM CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 178 U. S. App. D. C. 278, 547 F. 2d 575.

No. 76–1357. COLUMBIA TYPOGRAPHICAL UNION No. 101, INTERNATIONAL TYPOGRAPHICAL UNION OF NORTH AMERICA, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 178 U. S. App. D. C. 276, 546 F. 2d 1042.

No. 76–1369. PENNSYLVANIA TRANSFER COMPANY OF PHILADELPHIA, INC. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1163.

No. 76–1363. MARTIN *v.* CLAYTOR, SECRETARY OF THE NAVY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 76–1370. METHOT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 809.

No. 76–1378. WHITESEL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 543 F. 2d 1176.

No. 76–1389. MARVEL ET UX., DBA MARVEL PHOTO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 548 F. 2d 295.

No. 76–1399. MONTANYE, FORMER CORRECTIONAL SUPERINTENDENT, ET AL. *v.* HAYMES. C. A. 2d Cir. Certiorari denied. Reported below: 547 F. 2d 188.

No. 76–1402. POIRIER & McLANE CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 547 F. 2d 161.

No. 76–1444. CARBONE *v.* CONNECTICUT; and
No. 76–1532. CARBONE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 172 Conn. 242, 374 A. 2d 215.

No. 76–1448. GRIGSBY *v.* STERLING DRUG, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 177 U. S. App. D. C. 270, 543 F. 2d 417.

No. 76–1458. EAGLE LEASING CORP. ET AL. *v.* HARTFORD FIRE INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 540 F. 2d 1257.

No. 76–1459. PFOTZER ET AL. *v.* AMERCOAT CORP. ET AL. Sup. Ct. Conn. Certiorari denied. Reported below: 172 Conn. 681, 364 A. 2d 867.

No. 76–1462. DANIELS *v.* SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 1174.

No. 76–1467. UNITED STATES STEEL CORP. *v.* UNITED MINE WORKERS OF AMERICA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 548 F. 2d 67.

No. 76–1474. ABBOTT *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 334 So. 2d 642.

No. 76–1475. LAMB ENTERPRISES, INC., ET AL. *v.* KIROFF ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 1052.

No. 76–1479. QUALLS *v.* FRESNO COUNTY BOARD OF SUPERVISORS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 808.

No. 76–1483. TEAMSTERS LOCAL UNION 377 *v.* SCOTT. C. A. 6th Cir. Certiorari denied. Reported below: 548 F. 2d 1244.

No. 76–1496. MANCINI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 596.

No. 76–1517. JACOBS ET AL. *v.* SAPP ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 547 F. 2d 1170.

No. 76–1553. FINAN, DBA HOUSE OF KAWASAKI ET AL. *v.* KAWASAKI MOTORS CORP., U. S. A. C. A. 5th Cir. Certiorari denied.

No. 76–1557. MIMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 549 F. 2d 517.

No. 76–1586. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 553 F. 2d 351.

No. 76–1618. COSTEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 909.

No. 76–5167. BOLDEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 329.

No. 76–5229. ALLEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 325.

No. 76–5898. TOBIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 420.

No. 76–6264. COOK *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 76–6327. O'NEAL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 40 Ill. App. 3d 448, 352 N. E. 2d 282.

No. 76–6338. HERDRICKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 547 F. 2d 1168.

No. 76–6357. PROVENCE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 337 So. 2d 783.

No. 76–6364. VERES *v.* COUNTY OF MONROE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 542 F. 2d 1177.

No. 76–6376. SANFORD *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 63 Cal. App. 3d 952, 134 Cal. Rptr. 155.

No. 76–6389. PEACH *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 76–6394. CAMERIERO *v.* UNITED STATES; and
No. 76–6411. GALANTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 547 F. 2d 733.

No. 76–6396. HOLMBERG *v.* PARRATT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 548 F. 2d 745.

No. 76–6400. LAWRENCE *v.* KOZLOWSKI, COMMISSIONER OF MOTOR VEHICLES. Sup. Ct. Conn. Certiorari denied. Reported below: 171 Conn. 705, 372 A. 2d 110.

No. 76–6424. COX *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 76–6434. HOUSAND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 550 F. 2d 818.

No. 76–6466. BAKER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 238 Ga. 389, 233 S. E. 2d 347.

No. 76–6470. JINKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 908.

No. 76–6477. STURDEVANT *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 76 Wis. 2d 247, 251 N. W. 2d 50.

No. 76–6481. ALTSTADT *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 76–6486. JACKSON *v.* DAVIS ET AL. C. A. 9th Cir. Certiorari denied.

No. 76–6512. WOODS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 549 F. 2d 202.

No. 76–6516. MELLOR *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 336 So. 2d 1192.

No. 76–6558. OWENS *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 76–6592. ROSSETTI *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 76–6622. PATTERSON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 238 Ga. 204, 232 S. E. 2d 233.

No. 76–6626. LIPSCOMB *v.* LIBBY ET AL. C. A. 1st Cir. Certiorari denied.

No. 76–6628. MYDELL *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 238 Ga. 450, 233 S. E. 2d 199.

No. 76–6630. KARLIN *v.* GRAY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 523.

No. 76–6638. JOHNSON *v.* PUTNAM ET AL. C. A. 1st Cir. Certiorari denied.

No. 76–6639. SPARROW *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 76–6640. MCDONOUGH *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 551 F. 2d 307.

No. 76–6642. CROWLEY *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 76–6643. FORD *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 76–6644. COTTON *v.* HUTTO, CORRECTIONS COMMISSIONER. C. A. 8th Cir. Certiorari denied.

No. 76–6649. JONES *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 253 Ind. 235, 252 N. E. 2d 572.

No. 76–6653. HERNANDEZ *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 550 F. 2d 1282.

No. 76–6657. MARTIN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 177.

No. 76–6690. MOORE *v.* NEWELL, SHERIFF. C. A. 6th Cir. Certiorari denied. Reported below: 548 F. 2d 671.

No. 76–6725. EDMOND *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 546 S. W. 2d 289.

No. 76–6729. GALLAGHER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 76–6732. PARR-PLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 660.

No. 76–6735. MONROE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 552 F. 2d 860.

No. 76–6740. SHIRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 76–6742. MAESTAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 554 F. 2d 834.

No. 76–6746. SCHLOBOHM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 76–6749. KERR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 76–6750. WILLIAMS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 175 U. S. App. D. C. 363, 535 F. 2d 1325.

No. 76–6752. KING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 76–6755. CYPHERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 630.

No. 76–6760. WHITE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 553 F. 2d 310.

No. 76–6772. LERMA-COTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 1071.

No. 76–6776. JOHNSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 76–6794. WOJTOWICZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 550 F. 2d 786.

No. 76–919. FORT BELKNAP INDIAN COMMUNITY, FORT BELKNAP INDIAN RESERVATION *v.* DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF MONTANA, IN AND FOR THE COUNTY OF BLAINE, ET AL. Sup. Ct. Mont. Motion of National Congress of American Indians, Inc., for leave to file a brief as *amicus curiae* granted. Motion of respondent James W. Gardipee, real party in interest, for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 168 Mont. 529, 554 P. 2d 1115.

No. 76–970. KUHNS ET AL. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 61 Cal. App. 3d 735, 132 Cal. Rptr. 725.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

The California courts, in response to our remand for reconsideration in light of *Miller* v. *California*, 413 U. S. 15 (1973), reaffirmed petitioners' 1971 convictions for selling obscene materials in violation of Cal. Penal Code Ann. § 311.2 (West 1970). I would reverse the convictions. I adhere to my view expressed in *Miller* that this statute is "unconstitutionally overbroad, and therefore invalid on its face." 413 U. S., at 47 (dissenting opinion). See also *Splawn* v. *California*, *ante*, p. 595 (BRENNAN, J., dissenting); *Pendleton* v. *California*, 423 U. S. 1068 (1976) (BRENNAN, J., dissenting from dismissal of appeal); *Sandquist* v. *California*, 423 U. S. 900, 901 (1975) (BRENNAN, J., dissenting from denial of certiorari); *Tobalina* v. *California*, 419 U. S. 926 (1974) (BRENNAN, J., dissenting from denial of certiorari); *Kaplan* v. *California*, 419 U. S. 915 (1974) (BRENNAN, J., dissenting from denial of certiorari); *Blank* v. *California*, 419 U. S. 913 (1974) (BRENNAN, J., dissenting from denial of certiorari).

No. 76–1079. LEVC, AKA O'BLAK, ET AL. *v.* CONNORS, TREASURER OF MONTANA, ET AL. Sup. Ct. Mont. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 171 Mont. 1, 555 P. 2d 750.

No. 76–1120. California Department of Benefit Payments et al. *v.* England, Trustee in Bankruptcy, et al. C. A. 9th Cir. Certiorari denied. Mr. Justice Blackmun would grant certiorari. Reported below: 546 F. 2d 821.

No. 76–1445. Maugnie *v.* Compagnie Nationale Air France. C. A. 9th Cir. Certiorari denied. Mr. Justice Blackmun would grant certiorari. Reported below: 549 F. 2d 1256.

No. 76–1189. Maryland *v.* Downs. Ct. App. Md. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 278 Md. 610, 366 A. 2d 41.

No. 76–1432. Standard Oil Company of California *v.* Federal Trade Commission;

No. 76–1434. Mobil Oil Corp. *v.* Federal Trade Commission; and

No. 76–1435. Texaco Inc. et al. *v.* Federal Trade Commission. C. A. D. C. Cir. Motion of the Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. Mr. Justice Stewart, Mr. Justice White, and Mr. Justice Powell took no part in the consideration or decision of this motion and these petitions. Reported below: 180 U. S. App. D. C. 390, 555 F. 2d 862.

No. 76–1437. Sheet Metal Workers' International Association, Local 28, AFL–CIO *v.* Carrier Air Conditioning Co. et al. C. A. 2d Cir. Certiorari denied. Mr. Justice Powell took no part in the consideration or decision of this petition. Reported below: 547 F. 2d 1178.

No. 76–6616. Bradington *v.* International Business Machines Corp. C. A. 4th Cir. Certiorari denied. Mr. Justice Blackmun took no part in the consideration or decision of this petition. Reported below: 539 F. 2d 705.

Rehearing Denied

No. 76–1036. GRAVITT, EXECUTRIX, ET AL. *v.* SOUTHWESTERN BELL TELEPHONE CO. ET AL., 430 U. S. 723;

No. 76–1282. FULTON *v.* HECHT ET AL., 430 U. S. 984;

No. 76–1379. DAVIS *v.* UNITED STATES, *ante*, p. 917;

No. 76–6019. JUAREZ-RODRIGUEZ *v.* UNITED STATES, 430 U. S. 985;

No. 76–6067. DOVE *v.* NEW YORK ET AL., *ante*, p. 901. Petitions for rehearing denied.

No. 75–1687. UNITED STATES TRUST CO. OF NEW YORK, TRUSTEE *v.* NEW JERSEY ET AL., *ante*, p. 1. Petition for rehearing denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

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ANTITRUST ACTS.

1. *Pass-on theory—Use offensively by indirect purchaser—Treble-damages action under Clayton Act.*—If a pass-on theory may not be used defensively by an antitrust violator (defendant) against a direct purchaser (plaintiff) that theory may not be used offensively by an indirect purchaser (plaintiff) against an alleged violator (defendant). Therefore, unless *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, is to be overruled or limited, it bars pass-on theory of respondents (State of Illinois and local governmental entities) in their treble-damages action under § 4 of Clayton Act alleging that petitioners, concrete block manufacturers (which sell to masonry contractors, which in turn sell to general contractors, from which respondents purchase block in form of masonry structures), had engaged in a price-fixing conspiracy in violation of § 1 of Sherman Act. Illinois Brick Co. v. Illinois, p. 720.

2. *§ 4 of Clayton Act—Illegally overcharged direct purchaser as injured party—Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, which held that generally illegally overcharged direct purchaser suing for treble damages under § 4 of Clayton Act, and not others in chain of manufacture or distribution, is party "injured in his business or property" within meaning of § 4, was correctly decided and its construction of § 4 is adhered to. Illinois Brick Co. v. Illinois, p. 720.

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1. *Challenge to sufficiency of indictment—Court of Appeals' jurisdiction.*—Court of Appeals had no jurisdiction under 28 U. S. C. § 1291 to pass on merits of petitioners' challenge to indictment as failing to charge an offense, since District Court's rejection of such challenge does not

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come within "collateral order" exception to final-judgment rule announced in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541. That rejection is not "collateral" in any sense of that term, but rather goes to very heart of issues to be resolved at upcoming trial. Moreover, issue resolved adversely to petitioners is such that it may be reviewed effectively, and, if necessary, corrected if and when a final judgment results. Abney v. United States, p. 651.

2. *Denial of motion to dismiss indictment—"Final decision."*—District Court's pretrial order denying petitioners' motion to dismiss indictment on double jeopardy grounds was a "final decision" within meaning of 28 U. S. C. § 1291, and thus was immediately appealable. Abney v. United States, p. 651.

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CIVIL RIGHTS ACT OF 1964.

1. *Employment discrimination—Airline—Female flight attendant—Seniority rights.*—Where respondent female air flight attendant failed to file a timely claim against petitioner airline for violation of Title VII of Act when her employment was terminated in 1968 pursuant to a later invalidated policy because she got married, petitioner does not commit a present, continuing violation of Title VII by refusing to credit respondent, after rehiring her in 1972, with pre-1972 seniority, absent any allegation that petitioner's seniority system, which is neutral in its operation, discriminates against former female employees or victims of past discrimination. Moreover, § 703 (h) of Title VII, which provides that it shall not be an unlawful employment practice to apply different terms of employment pursuant to a bona fide seniority system if any disparity is not result of intentional discrimination, bars respondent's claim, absent any attack on bona fides of petitioner's seniority system or of any charge that system is intentionally designed to discriminate because of race, color, religion, sex, or national origin. United Air Lines, Inc. v. Evans, p. 553.

2. *Employment discrimination—Motor carrier—Line drivers—Improper certification of class action.*—In respondent Mexican-Americans' action against petitioner unions and petitioner motor carrier claiming employment discrimination in violation of Title VII of Act with respect to line-driver positions, Court of Appeals plainly erred in certifying a class action and in imposing classwide liability on petitioners, where trial court proceedings made clear that respondents were not members of class of discriminatees that they purported to represent. East Texas Motor Freight System, Inc. v. Rodriguez, p. 395.

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3. *Employment discrimination—Motor carrier—Line drivers—Incumbent employees—Retroactive seniority.*—With respect to petitioner motor carrier's employment discrimination in line-driver positions, an incumbent employee's failure to apply for a line-driver job does not inexorably bar an award of retroactive seniority, and individual nonapplicants must be afforded an opportunity to undertake their difficult task of proving that they should be treated as applicants and therefore are presumptively entitled to relief accordingly. Teamsters v. United States, p. 324.

4. *Employment discrimination—Motor carrier—Line drivers—Relief.*—Where petitioner motor carrier engaged in a systemwide pattern or practice of employment discrimination against minority members in violation of Title VII of Act with respect to line-driver positions, every post-Act minority member applicant for a line-driver position is presumptively entitled to relief, subject to a showing by carrier that its earlier refusal to place applicant in a line-driver job was not based on its policy of discrimination. Teamsters v. United States, p. 324.

5. *Pattern or practice of employment discrimination—Motor carrier—Burden of proof.*—Government sustained its burden of proving that petitioner motor carrier engaged in a systemwide pattern or practice of employment discrimination against minority members in violation of Title VII of Act by regularly and purposefully treating such members less favorably than white persons. Evidence, showing pervasive statistical disparities in line-driver positions between employment of minority members and whites, and bolstered by considerable testimony of specific instances of discrimination, was not adequately rebutted by carrier and supported findings of courts below. Teamsters v. United States, p. 324.

6. *Post-Act discriminatory employment policies—Motor carrier—Retroactive seniority.*—Since Government proved that petitioner motor carrier engaged in a post-Act pattern of discriminatory employment policies, retroactive seniority may be awarded as relief for post-Act discriminatees even if seniority system agreement makes no provision for such relief. Teamsters v. United States, p. 324.

7. *Seniority system—Pre-Act discrimination—Retroactive seniority—Injunction against union.*—Seniority system in collective-bargaining agreements between petitioner motor carrier and petitioner union was protected by § 703 (h) of Act (which provides that notwithstanding other provisions, it shall not be an unlawful employment practice for an employer to apply different employment standards "pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate . . .) and therefore union's conduct in agreeing to and maintaining system did not violate Title VII. Employees who suffered only pre-Act discrimination are not entitled to relief, and no

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person may be given retroactive seniority to a date earlier than Act's effective date. District Court's injunction against union must consequently be vacated. Teamsters v. United States, p. 324.

CLASS ACTIONS. See also **Civil Rights Act of 1964, 2; Mootness.**

1. *Effect of intervening legislation on class certified.*—In class action challenging constitutionality of provisions of 1966 Pennsylvania statute governing voluntary admission and commitment to state mental institutions of persons aged 18 or younger, wherein District Court certified class to be represented by named plaintiffs as consisting of all persons 18 or younger who have been or may be admitted or committed to state mental health facilities pursuant to challenged provisions, material changes in status of those included in class certified that resulted from intervening 1976 Act and regulations preclude an informed resolution of that class' constitutional claims. Kremens v. Bartley, p. 119.

2. *Effect of mootness of named plaintiffs—Remand for reconsideration of class definition.*—In class action challenging constitutionality of provisions of Pennsylvania statute governing voluntary admission and commitment to state mental institutions of persons aged 18 or younger, wherein intervening legislation rendered named plaintiffs' claims moot, since none of critical factors that might allow adjudication of claims of a class after mootness of named plaintiffs are present, case must be remanded to District Court for reconsideration of class definition, exclusion of those whose claims are moot, and substitution of class representatives with live claims. Kremens v. Bartley, p. 119.

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CONSTITUTIONAL LAW.

I. Case or Controversy.

Constitutionality of state statutes.—Once District Court had decided that defendant police officers were not liable in appellee's suit against them for shooting and killing his son in an attempted escape from arrest, suit no longer presented a live "case or controversy" entitling appellee to declaratory judgment as to constitutionality of Missouri statutes permitting police to use deadly force in apprehending felon, and hence this Court is unable to consider merits of Court of Appeals' holding that such statutes were unconstitutional. Ashcroft v. Mattis, p. 171.

II. Contract Clause.

Prohibition of retroactive repeal of bistate covenant.—Contract Clause prohibits retroactive repeal of 1962 statutory covenant between New Jersey and New York limiting ability of Port Authority of New York and New Jersey to subsidize rail passenger transportation from revenues and reserves pledged as security for consolidated bonds issued by Port Authority. United States Trust Co. v. New Jersey, p. 1.

III. Due Process.

1. *Decision as to bearing children—Regulation.*—Regulations imposing a burden on a decision as fundamental as whether to bear or beget a child may be justified only by compelling state interests, and must be narrowly drawn to express only those interests. Carey v. Population Services International, p. 678.

2. *Distribution of contraceptives—Prohibition as to persons under 16.*—District Court's judgment declaring unconstitutional, as applied to nonprescription contraceptives, provision, *inter alia*, of New York Education Law prohibiting distribution of contraceptives to persons under 16, is affirmed. Carey v. Population Services International, p. 678.

3. *Distribution of contraceptives—Prohibition except through licensed pharmacists.*—Provision of New York Education Law prohibiting distribution of nonmedical contraceptives to persons over 16 except through licensed pharmacists clearly burdens right of such individuals to use contraceptives if they so desire, and provision serves no compelling state interests. It cannot be justified by an interest in protecting health insofar as it applies to nonhazardous contraceptives or in protecting potential life, nor can it be justified by a concern that young people not sell contracep-

CONSTITUTIONAL LAW—Continued.

tives, or as being designed to serve as a quality control device or as facilitating enforcement of other provisions of statute. Carey v. Population Services International, p. 678.

4. *Federal obscenity statute—Vagueness.*—Title 18 U. S. C. § 1461, which prohibits mailing of obscene materials, is not unconstitutionally vague as applied to prosecution of petitioner for intrastate mailing in violation of § 1461, since type of conduct covered by statute can be ascertained with sufficient ease to avoid due process pitfalls. Smith v. United States, p. 291.

5. *Ordinance limiting occupancy of dwelling unit to single family.*—Judgment upholding appellant's conviction for violating ordinance, which she claims is unconstitutional and which limits occupancy of a dwelling unit to members of a single family, but defines "family" in such a way that appellant's household does not qualify (her son and two grandsons, who are first cousins, living with her in her home), is reversed. Moore v. East Cleveland, p. 494.

6. *Preindictment delay.*—Court of Appeals erred in affirming District Court's dismissal of indictment against respondent on ground that 18-month preindictment delay was unjustified. Although Speedy Trial Clause of Sixth Amendment is applicable only after a person has been accused of a crime and statutes of limitations provide "'the primary guarantee against bringing overly stale criminal charges,'" those statutes do not fully define a defendant's rights with respect to events antedating indictment, and Due Process Clause has a limited role to play in protecting against oppressive delay. To prosecute a defendant following good-faith investigative delay, as apparently existed in this case, does not deprive him of due process even if his defense might have been somewhat prejudiced by lapse of time. United States v. Lovasco, p. 783.

7. *Procedures for removal of foster children from foster homes.*—New York statutory and regulatory procedures for removal of foster children from foster homes are constitutionally adequate even were it to be assumed that appellee foster parents and foster parent organization have a protected "liberty interest" under Fourteenth Amendment. Procedures employed by State and New York City satisfy standards for determining sufficiency of procedural protections, taking into consideration factors enumerated in *Mathews* v. *Eldridge*, 424 U. S. 319, 335: (1) private interest that will be affected by official action; (2) risk of an erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards; and (3) government's interest, including function involved and fiscal and administrative burdens that additional or substitute procedural requirement would entail. Smith v. Organization of Foster Families, p. 816.

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8. *Removal of foster child from foster home.*—District Court erred in finding that "grievous loss" to foster child resulting from improvident decision to remove child from foster home implicated due process guarantee, as determining factor is nature of interest involved rather than its weight. Smith v. Organization of Foster Families, p. 816.

9. *Second-degree murder prosecution—Trial judge's failure to instruct on issue of causation.*—In prosecution of respondent and his accomplice for, *inter alia*, second-degree murder under New York statute providing that a person is guilty of second-degree murder when "[u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person," trial judge's failure to instruct jury on issue of causation was not constitutional error requiring District Court to grant habeas corpus relief. Henderson v. Kibbe, p. 145.

10. *Suspension or revocation of driver's license without hearing.*—Illinois Driver Licensing Law, which authorizes Secretary of State to suspend or revoke a driver's license without preliminary hearing upon a showing by his records or other sufficient evidence that driver's conduct falls into any of 18 enumerated categories (one of which is that driver has been repeatedly convicted of offenses against traffic laws to a degree indicating "lack of ability to exercise ordinary and reasonable care in the safe operation of a motor vehicle or disrespect for the traffic laws and the safety of other persons upon the highway"), as implemented by Secretary's regulations, is constitutionally adequate under Due Process Clause of Fourteenth Amendment, as analyzed in *Mathews* v. *Eldridge*, 424 U. S. 319, 333. Dixon v. Love, p. 105.

11. *Vagueness—Notice as to prohibited obscene materials.*—Illinois statute forbidding sale of obscene matter and providing that "[a] thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters," is not unconstitutionally vague as failing to give appellant notice that materials dealing with kind of sexual conduct (sado-masochistic) involved here could not be legally sold in State, where (whether or not State complied with requirement of *Miller* v. *California*, 413 U. S. 15, that sexual conduct that may not be depicted must be specifically defined by applicable state law as written or authoritatively construed) appellant had ample guidance from a previous decision of Illinois Supreme Court making it clear that his conduct did not conform to Illinois law. Ward v. Illinois, p. 767.

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IV. Eighth Amendment.

Mandatory death sentence—Murder of police officer—Louisiana statute.—Mandatory death sentence imposed upon petitioner pursuant to Louisiana statute for first-degree murder of a police officer engaged in performance of his lawful duties, violates Eighth and Fourteenth Amendments, since statute allows for no consideration of particularized mitigating factors in deciding whether death sentence should be imposed. Roberts v. Louisiana, p. 633.

V. Equal Protection of the Laws.

1. *Court-ordered legislative reapportionment plan—Mississippi.*—Federal District Court's legislative reapportionment plan for Mississippi's Senate and House of Representatives does not embody equitable discretion necessary to effectuate standards of Equal Protection Clause of Fourteenth Amendment in that plan failed to meet that Clause's most elemental requirement that legislative districts be "as nearly of equal population as is practicable." Connor v. Finch, p. 407.

2. *Worker unemployed due to labor dispute—Disqualification from unemployment benefits.*—Ohio statute that disqualified a worker from unemployment benefits if his unemployment was "due to a labor dispute other than a lockout at any factory . . . owned or operated by the employer by which he is or was last employed," has a rational relation to a legitimate state interest and is constitutional. Ohio Bureau of Employment Services v. Hodory, p. 471.

VI. Ex Post Facto Laws.

Obscenity prosecution—Use of evidence of pandering.—Though section of California Penal Code that authorized challenged instruction permitting jury, in prosecution of petitioner for selling obscene film in violation of California law, to consider whether film was being commercially exploited, was enacted after part of conduct for which petitioner was convicted but prior to his trial, that section does not create any new substantive offense but merely declares what type of evidence may be received and considered by jury in deciding whether allegedly obscene material was "utterly without redeeming social importance." *People* v. *Noroff*, 67 Cal. 2d 791, 433 P. 2d 479, relied on by petitioner in support of his claim that challenged instruction violated prohibition against *ex post facto* laws, did not disapprove of any use of evidence of pandering for its probative value on obscenity issue but merely rejected concept of pandering of nonobscene material as a separate crime under state law. Splawn v. California, p. 595.

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VII. Fifth Amendment.

1. *Double jeopardy—Retrial on conspiracy charge.*—Where petitioners and others were charged in a single-count indictment with conspiracy and an attempt to obstruct interstate commerce by means of extortion, in violation of Hobbs Act, and jury returned a guilty verdict against each petitioner, Double Jeopardy Clause does not preclude retrial on conspiracy charge. It cannot be assumed that jury disregarded District Court's instructions at initial trial that it could not return a guilty verdict unless Government proved beyond a reasonable doubt all of elements of both offenses charged in indictment, and therefore it would appear that jury did not acquit petitioners of conspiracy charge, while convicting them on attempt charge, as petitioners urge was a possibility in view of general verdict. Abney v. United States, p. 651.

2. *Privilege against self-incrimination—Grand jury testimony—Failure to warn potential defendant—Use of testimony in subsequent trial.*—Where, although respondent was not informed in advance of his appearance before a grand jury investigating a theft that he might be indicted for theft, he was given a series of warnings after being sworn, including warning that he had a right to remain silent, his grand jury testimony may properly be used against him in a subsequent trial. Comprehensive warnings he received, whether or not they were constitutionally required, dissipated any element of compulsion to self-incrimination that might otherwise have been present. Fact that a subpoenaed grand jury witness is a putative or potential defendant neither impairs nor enlarges his constitutional rights, and hence it is unnecessary to give such a defendant warnings that he is a potential defendant. United States v. Washington, p. 181.

3. *Privilege against self-incrimination—Removal of political party officer for refusal to waive privilege.*—New York statute providing for removal of political party officer who refuses to waive immunity against subsequent criminal prosecution when subpoenaed as grand jury witness to testify concerning conduct of his office, violated right of appellee (who was divested of his state political party offices pursuant to statute) to be free of compelled self-incrimination under Fifth Amendment. Lefkowitz v. Cunningham, p. 801.

4. *Privilege against self-incrimination—Suppression of false grand jury testimony.*—A witness who is called to testify before a grand jury while under investigation for possible criminal activity, and is later indicted for perjury in testimony given before grand jury, is not entitled to suppression of false testimony on ground that no effective warning of Fifth Amendment privilege to remain silent had been given. United States v. Wong, p. 174.

CONSTITUTIONAL LAW—Continued.

VIII. First Amendment.

1. *Freedom of association—Collective-bargaining agreement with teachers' union—Agency-shop clause—Use of service charges.*—Insofar as service charges imposed on appellant teachers (who opposed collective bargaining in public sector) equal in amount to union dues pursuant to an agency-shop clause of a collective-bargaining agreement permitted by a Michigan statute are used to finance expenditures by appellee Union for collective-bargaining, contract-administration, and grievance-adjustment purposes, agency-shop clause is valid. Abood v. Detroit Board of Education, p. 209.

2. *Freedom of association—Collective-bargaining agreement with teachers' union—Agency-shop clause—Use of service charges for ideological causes.*—Principles that under First Amendment an individual should be free to believe as he will and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by State, prohibits appellee Board of Education and Union from requiring, pursuant to an agency-shop clause in a collective-bargaining agreement between Board and Union permitted by a Michigan statute, any of appellant teachers (who opposed collective bargaining in public sector) to contribute, in form of service charges, to support of an ideological cause he may oppose as a condition of holding a job as a public school teacher. Abood v. Detroit Board of Education, p. 209.

3. *Freedom of speech—Obscenity—Proscription of sado-masochistic materials.*—Sado-masochistic materials are kind of materials that may be proscribed by state law, even though they were not expressly included within examples of kinds of sexually explicit representations that *Miller* v. *California*, 413 U. S. 15, used to explicate aspect of its obscenity definition dealing with patently offensive depictions of specifically defined sexual conduct. Ward v. Illinois, p. 767.

4. *Freedom of speech—Obscenity prosecution—Jury instruction.*—In prosecution of petitioner for selling obscene film in violation of California law, instruction permitting jury, in determining whether film was utterly without redeeming social importance, to consider circumstances of sale and distribution, particularly whether such circumstances indicated that film was being commercially exploited for sake of its prurient appeal, violated no First Amendment rights of petitioner. Circumstances of distribution of material are relevant from standpoint of whether public confrontation with potentially offensive aspects of material is being forced and are "equally relevant to determining whether social importance claimed for the material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes." Splawn v. California, p. 595.

CONSTITUTIONAL LAW—Continued.

5. *Freedom of speech—Opening of international mail for customs inspection.*—Opening of international mail under guidelines of statute only when customs official has reason to believe mail contains other than correspondence, while reading of any correspondence inside envelopes is forbidden by postal regulations, does not impermissibly chill exercise of free speech under First Amendment, and any "chill" that might exist under such circumstances is not only "minimal" but is also wholly subjective. United States v. Ramsey, p. 606.

6. *Freedom of speech—Ordinance prohibiting real estate signs.*—A township ordinance prohibiting posting of real estate "For Sale" and "Sold" signs for purpose of stemming what township perceived as flight of white homeowners from a racially integrated community violates First Amendment. Linmark Associates, Inc. v. Willingboro, p. 85.

7. *Freedom of speech—Prohibition against advertising or displaying contraceptives.*—Provision of New York Education Law prohibiting anyone, including licensed pharmacists, from advertising or displaying contraceptives cannot be justified on ground that advertisements of contraceptive products would offend and embarrass those exposed to them and that permitting them would legitimize sexual activity of young people. These are classically not justifications validating suppression of expression protected by First Amendment, and here advertisements in question merely state availability of products that are not only entirely legal but constitutionally protected. Carey v. Population Services International, p. 678.

8. *Freedom of speech—Proscription of obscene matter—Overbreadth.*—Illinois statute forbidding sale of obscene matter is not unconstitutionally overbroad for failure to state specifically kinds of sexual conduct description or representation of which State intends to proscribe, where it appears that in prior decisions Illinois Supreme Court, although not expressly describing kinds of sexual conduct intended to be referred to under guideline of *Miller* v. *California*, 413 U. S. 15, requiring inquiry "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," expressly incorporated such guideline as part of law and thereby intended as well to adopt *Miller* explanatory examples, which gave substantive meaning to such guideline by indicating kinds of materials within its reach. Ward v. Illinois, p. 767.

IX. Fourth Amendment.

1. *Searches and seizures—Border searches.*—Border searches without probable cause and without a warrant are nonetheless "reasonable" within meaning of Fourth Amendment. United States v. Ramsey, p. 606.

2. *Searches and seizures—Border-search exception.*—Border-search exception is not based on doctrine of "exigent circumstances," but is a long-

CONSTITUTIONAL LAW—Continued.

standing, historically recognized exception to Fourth Amendment's general principle that a warrant be obtained. United States v. Ramsey, p. 606.

3. *Searches and seizures—Border-search exception—International mail.*—Inclusion of international mail within border-search exception does not represent any "extension" of that exception. Exception is grounded in recognized right of sovereign to control, subject to substantive limitations imposed by Constitution, who and what may enter country, and no different constitutional standards should apply simply because envelopes were mailed, not carried, critical fact being that envelopes cross border and enter country, not that they are brought in by one mode of transportation rather than another. It is their entry into country from without it that makes a resulting search "reasonable." United States v. Ramsey, p. 606.

4. *Searches and seizures—Opening of international mail for customs inspection.*—Fourth Amendment does not interdict actions taken by customs inspector in opening and searching, at General Post Office in New York City (a "border" for border-search purposes), letter-sized airmail envelopes, which were from Thailand, a known source of narcotics, and were bulky and much heavier than a normal airmail letter. United States v. Ramsey, p. 606.

CONTEMPORARY COMMUNITY OBSCENITY STANDARDS. See **Federal-State Relations**, 5; **Procedure**, 2.

CONTRACEPTIVES. See **Constitutional Law**, III, 1–3; VIII, 7; **Standing to Sue.**

CONTRACT CLAUSE. See **Constitutional Law**, II.

CONVICTED FELONS. See **Omnibus Crime Control and Safe Streets Act of 1968.**

COURT-ORDERED LEGISLATIVE REAPPORTIONMENT PLANS. See **Constitutional Law**, V, 1.

COURTS OF APPEALS. See **Appeals**; **Civil Rights Act of 1964**, 2.

COVENANTS BETWEEN STATES. See **Constitutional Law**, II.

CRIMINAL LAW. See also **Appeals**; **Constitutional Law**, III, 4–6, 9, 11; IV; VI; VII, 1, 2, 4; VIII, 3–5, 8; IX; **Federal-State Relations**, 5; **Habeas Corpus**; **Obscenity**; **Omnibus Crime Control and Safe Streets Act of 1968**; **Procedure**, 2.

Opening of international mail for customs inspection—"Reasonable cause to suspect" contraband.—Where, acting pursuant to statute and regulations authorizing customs officials to inspect incoming international mail when they have a "reasonable cause to suspect" that mail contains

CRIMINAL LAW—Continued.

illegally imported merchandise, customs inspector, based on facts that incoming letter-sized airmail envelopes were from Thailand, a known source of narcotics, and were bulky and much heavier than a normal airmail letter, opened envelopes for inspection at General Post Office in New York City (a "border" for border-search purposes), inspector had "reasonable cause to suspect" that there was merchandise or contraband in envelopes, and therefore search was plainly authorized by statute. United States v. Ramsey, p. 606.

CRITICAL MILITARY SKILLS. See **Armed Forces.**

CRUEL AND UNUSUAL PUNISHMENT. See **Constitutional Law**, IV.

CUSTOMS INSPECTION OF INTERNATIONAL MAIL. See **Constitutional Law**, VIII, 5; IX; **Criminal Law.**

DEATH SENTENCES. See **Constitutional Law**, IV.

DELAY IN INDICTMENT. See **Constitutional Law**, III, 6.

DENIAL OF MOTION TO DISMISS INDICTMENT. See **Appeals.**

DISCRIMINATION. See **Civil Rights Act of 1964.**

DISMISSAL OF INDICTMENTS. See **Appeals; Constitutional Law**, III, 6.

DISPLAY OF CONTRACEPTIVES. See **Constitutional Law**, VIII, 7; **Standing to Sue.**

DISQUALIFICATION FROM UNEMPLOYMENT BENEFITS DURING LABOR DISPUTE. See **Constitutional Law**, V, 2; **Federal-State Relations**, 1, 6.

DISTRIBUTION OF CONTRACEPTIVES. See **Constitutional Law**, III, 1–3; **Standing to Sue.**

DISTRICT COURT OF GUAM. See **Jurisdiction.**

DISTRICT COURTS. See **Class Actions; Procedure**, 1.

DOUBLE JEOPARDY. See **Appeals; Constitutional Law**, VII, 1.

DRIVERS' LICENSES. See **Constitutional Law**, III, 10.

DUE PROCESS. See **Constitutional Law**, III.

EIGHTH AMENDMENT. See **Constitutional Law**, IV.

EJECTION SYSTEMS FOR FIGHTER AIRCRAFT. See **Federal Tort Claims Act.**

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964; Military Selective Service Act.**

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964**, 1, 3–7.

ENLISTED PERSONNEL'S RIGHT TO RE-ENLISTMENT BONUSES. See **Armed Forces.**

ENVIRONMENTAL PROTECTION AGENCY. See **Judicial Review.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, V.

EVIDENTIARY HEARINGS ON REVOCATION OF DRIVERS' LICENSES. See **Constitutional Law**, III, 10.

EX POST FACTO LAWS. See **Constitutional Law**, VI.

EXTENSION OF ENLISTMENTS. See **Armed Forces.**

EXTORTION. See **Constitutional Law**, VII, 1.

FAILURE TO GIVE CAUSATION INSTRUCTIONS TO JURY. See **Constitutional Law**, III, 9.

"FAMILY" FOR ZONING PURPOSES. See **Constitutional Law**, III, 5.

FEDERAL ENROLLMENT AND LICENSING LAWS. See **Federal-State Relations**, 2, 3.

FEDERAL INTERFERENCE WITH STATE CIVIL ENFORCEMENT ACTION. See **Federal-State Relations**, 4.

FEDERAL OBSCENITY PROSECUTIONS. See **Constitutional Law**, III, 4; **Federal-State Relations**, 5; **Procedure**, 2.

FEDERAL-STATE RELATIONS.

1. *Abstention—Validity of state statute.*—Where, after his claim for unemployment benefits was disallowed under Ohio statute that disqualified a worker from such benefits if his unemployment was due to a labor dispute, appellee filed a class action against appellants in Federal District Court for declaratory and injunctive relief, asserting that Ohio statute conflicted with Social Security Act and that, as applied, was irrational and had no valid public purpose, in violation of Due Process and Equal Protection Clauses of Fourteenth Amendment, abstention is not required under either *Younger* v. *Harris*, 401 U. S. 37, or *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496. Where Ohio has concluded to submit constitutional issue to this Court for immediate resolution, *Younger* principles of equity and comity do not require this Court to refuse Ohio immediate resolution it seeks. Nor is *Pullman* abstention appropriate, where possible benefits of abstention have become too speculative to justify or require avoidance of constitutional question. Ohio Bureau of Employment Services v. Hodory, p. 471.

FEDERAL-STATE RELATIONS—Continued.

2. *Commercial fishing rights—Chesapeake Bay—Pre-emption.*—Federal enrollment and licensing laws, under which vessels engaged in domestic or coastwise trade or used for fishing are "enrolled" for purpose of evidencing their national character and to enable them to obtain licenses regulating use to which vessels may be put, pre-empt Virginia statutes that in effect prohibit nonresidents of Virginia from catching menhaden in Virginia portion of Chesapeake Bay and that bar noncitizens (regardless of where they reside) from obtaining commercial fishing licenses for any kind of fish from Virginia. Hence, under Supremacy Clause, Virginia laws cannot prevent appellees whose fishing vessels, though foreign owned, have been federally licensed, from fishing for menhaden in Virginia's waters. Douglas v. Seacoast Products, Inc., p. 265.

3. *Commercial fishing rights—Vineyard Sound—Statutory basis.*—Where it appears that there may be a statutory basis for providing relief to respondent owner of federally enrolled and licensed fishing vessel against enforcement of a Massachusetts statute prohibiting nonresidents from dragging for fish by beam or otter trawl in Vineyard Sound during certain months, this Court will not decide question presented as to constitutionality of statute. Massachusetts v. Westcott, p. 322.

4. *Federal interference with state civil enforcement action.*—Where, after Illinois Department of Public Aid brought civil action against appellees to recover allegedly wrongfully received welfare payments and in connection therewith issued a writ of attachment against appellees' property without notice or hearing, appellees filed suit against appellant IDPA officials in Federal District Court, alleging that Illinois Attachment Act violated due process and seeking return of attached property, District Court should have dismissed complaint under *Younger* v. *Harris*, 401 U. S. 37, and *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, unless appellees' state remedies were inadequate to litigate their federal due process claim. Injunction asked for and issued by court interfered with Illinois' efforts to utilize Attachment Act as an integral part of State's enforcement action. Trainor v. Hernandez, p. 434.

5. *Federal obscenity prosecution—State definition of contemporary community standards.*—State law cannot define contemporary community standards for appeal to prurient interest and patent offensiveness that under *Miller* v. *California*, 413 U. S. 15, are applied in determining whether or not material is obscene, and Iowa obscenity statute is therefore not conclusive as to those standards. In federal prosecutions, such as this for mailing obscene materials in violation of 18 U. S. C. § 1461, those issues are fact questions for jury, to be judged in light of its understanding of contemporary community standards. Smith v. United States, p. 291.

FEDERAL-STATE RELATIONS—Continued.

6. *Worker unemployed due to labor dispute—State statute disqualifying from unemployment benefits—Conflict with, or pre-emption by, federal statutes.*—Ohio statute disqualifying a worker from unemployment benefits if his unemployment was due to a labor dispute is neither in conflict with, nor is it pre-empted by, 42 U. S. C. § 503 (a) (provision of Social Security Act that precludes Secretary of Labor from certifying payment of federal funds to state unemployment compensation programs unless state law provides for such methods of administration as Secretary finds are "reasonably calculated to insure full payment of unemployment compensation when due"), or Federal Unemployment Tax Act. Ohio Bureau of Employment Services v. Hodory, p. 471.

FEDERAL TORT CLAIMS ACT.

1. *Service-connected injuries—Limit of Government's liability—Third-party indemnity claim.*—Veterans' Benefits Act provides an upper limit of liability for Government as to service-connected injuries, and to permit third-party indemnity claim of petitioner manufacturer of fighter aircraft ejection system against United States in National Guard officer's action under FTCA against United States and petitioner for injuries received when ejection system malfunctioned during midair emergency, would circumvent such limitation. Stencel Aero Engineering Corp. v. United States, p. 666.

2. *Serviceman's action against United States—Third-party indemnity claim against United States.*—Petitioner manufacturer of fighter aircraft ejection system cannot maintain a third-party indemnity claim against United States in National Guard officer's damages action under Act against United States and petitioner for injuries received when ejection system malfunctioned during midair emergency. Right of a third party to recover in an indemnity action against United States recognized in *United States* v. *Yellow Cab Co.*, 340 U. S. 543, is limited by rationale of *Feres* v. *United States*, 340 U. S. 135 (wherein it was held that an on-duty serviceman injured because of Government officials' negligence may not recover against United States under Act) where injured party is a serviceman. Stencel Aero Engineering Corp. v. United States, p. 666.

FEDERAL UNEMPLOYMENT TAX ACT. See **Federal-State Relations**, 1, 6.

FELONS. See **Omnibus Crime Control and Safe Streets Act of 1968.**

FEMALE AIR FLIGHT ATTENDANTS. See **Civil Rights Act of 1964**, 1.

FIFTH AMENDMENT. See **Constitutional Law**, III, 6; VII.

FINAL DECISIONS. See **Appeals.**

FIREARMS. See **Omnibus Crime Control and Safe Streets Act of 1968.**

FIRST AMENDMENT. See **Constitutional Law, VIII.**

FIRST-DEGREE MURDER OF POLICE OFFICER. See **Constitutional Law, IV.**

FISHING RIGHTS. See **Federal-State Relations, 2, 3.**

FLIGHT OF WHITE HOMEOWNERS FROM RACIALLY INTEGRATED COMMUNITY. See **Constitutional Law, VIII, 6.**

"FOR SALE" SIGNS. See **Constitutional Law, VIII, 6.**

FOSTER PARENTS AND CHILDREN. See **Constitutional Law, III, 7, 8.**

FOURTEENTH AMENDMENT. See **Constitutional Law, III, 1–3, 5, 7–8, 10, 11; IV; V.**

FOURTH AMENDMENT. See **Constitutional Law, IX.**

FREEDOM OF ASSOCIATION. See **Constitutional Law, VIII, 1, 2.**

FREEDOM OF SPEECH. See **Constitutional Law, VIII, 3–8.**

GOVERNMENT EMPLOYEES. See **Constitutional Law, VIII, 1, 2.**

GRAND JURIES. See **Constitutional Law, VII, 2–4.**

GUAM. See **Jurisdiction.**

GUIDELINES FOR DETERMINING OBSCENITY. See **Constitutional Law, VIII, 3, 8; Obscenity.**

GUILTY PLEAS. See **Habeas Corpus.**

GUILTY VERDICTS. See **Constitutional Law, VII, 1.**

HABEAS CORPUS. See also **Constitutional Law, III, 9.**

Acceptance of guilty plea—Improper dismissal of habeas petition.—In light of nature of record of North Carolina trial court proceeding at which respondent's guilty plea to attempted safe robbery was accepted, and of ambiguous status of process of plea bargaining at time guilty plea was made, respondent's federal petition for a writ of habeas corpus alleging that guilty plea had been induced by his attorney's promise of lighter sentence than he received should not have been summarily dismissed. Blackledge v. Allison, p. 63.

HEARINGS ON REVOCATION OF DRIVERS' LICENSES. See **Constitutional Law, III, 10.**

HIGHWAY TRAFFIC AND SAFETY. See **Constitutional Law, III, 10.**

HOBBS ACT. See **Constitutional Law**, VII, 1.

HOUSING ORDINANCES. See **Constitutional Law**, III, 5.

ILLINOIS. See **Constitutional Law**, III, 10, 11; VIII, 3, 8; **Federal-State Relations**, 4; **Obscenity.**

IMPAIRMENT OF OBLIGATION OF CONTRACTS. See **Constitutional Law**, II.

IMPROPER CERTIFICATION OF CLASS ACTIONS. See **Civil Rights Act of 1964**, 2.

INCRIMINATION. See **Constitutional Law**, VII, 2–4.

INDEMNITY. See **Federal Tort Claims Act.**

INDICTMENTS. See **Appeals**; **Constitutional Law**, III, 6,

INDIRECT PURCHASERS' RIGHT TO RECOVER FOR OVERCHARGES. See **Antitrust Acts.**

INJUNCTIONS. See **Federal-State Relations**, 4.

INSPECTION OF INTERNATIONAL MAIL. See **Constitutional Law**, VIII, 5; IX; **Criminal Law.**

INSTRUCTIONS TO JURY IN MURDER PROSECUTION. See **Constitutional Law**, III, 9.

INSTRUCTIONS TO JURY IN OBSCENITY PROSECUTION. See **Constitutional Law**, VI; VIII, 4.

INTERNATIONAL MAIL INSPECTION. See **Constitutional Law**, VIII, 5; IX; **Criminal Law.**

INTERSTATE COMMERCE. See **Omnibus Crime Control and Safe Streets Act of 1968.**

INTERVENING LEGISLATION. See **Class Actions**; **Mootness**; **Procedure**, 1.

IOWA. See **Federal-State Relations**, 5.

JUDICIAL REVIEW.

Supreme Court—Validity of regulations under Clean Air Act.—This Court will not review judgments of Courts of Appeals invalidating transportation control plan regulations promulgated by Administrator of Environmental Protection Agency under Clean Air Act and imposed on various States as elements of an implementation plan, where federal parties have not only renounced an intent to seek review of invalidation of certain regulations but have conceded that those remaining in controversy are invalid unless modified. EPA v. Brown, p. 99.

JURISDICTION. See also **Appeals.**

District Court of Guam—Appellate jurisdiction.—Provision of § 22 of 1950 Organic Act of Guam that District Court of Guam "shall have such appellate jurisdiction as the [Guam] legislature may determine," does not authorize Guam Legislature to divest District Court's appellate jurisdiction under Act to hear appeals from local Guam courts, and to transfer that jurisdiction to newly created Guam Supreme Court, but empowers legislature to "determine" that jurisdiction only in sense of selection of what should constitute appealable causes. Guam v. Olsen, p. 195.

JURY INSTRUCTIONS IN MURDER PROSECUTION. See **Constitutional Law,** III, 9.

JURY INSTRUCTIONS IN OBSCENITY PROSECUTION. See **Constitutional Law,** VI; VIII, 4.

JUSTICIABILITY. See **Constitutional Law,** I.

LABOR UNIONS. See **Constitutional Law,** VIII, 1, 2.

LEGISLATIVE REAPPORTIONMENT PLANS. See **Constitutional Law,** V, 1.

ENSE SUSPENSION OR REVOCATION. See **Constitutional Law,** III, 10.

LIMITATIONS ON OCCUPANCY OF DWELLING UNITS. See **Constitutional Law,** III, 5.

LINE DRIVERS. See **Civil Rights Act of 1964,** 2–7.

LIVE CASE OR CONTROVERSY. See **Constitutional Law,** I.

LOCAL GOVERNMENTAL EMPLOYEES. See **Constitutional Law,** VIII, 1, 2.

LOUISIANA. See **Constitutional Law,** IV.

MAILING OF OBSCENE MATERIALS. See **Constitutional Law,** III, 4; **Federal-State Relations,** 5; **Procedure,** 2.

MANDATORY DEATH SENTENCES. See **Constitutional Law,** IV.

MASSACHUSETTS. See **Federal-State Relations,** 3.

MENHADEN. See **Federal-State Relations,** 2.

MENTAL INSTITUTIONS. See **Class Actions; Mootness.**

MEXICAN-AMERICANS. See **Civil Rights Act of 1964,** 2.

MILITARY SELECTIVE SERVICE ACT.

Returning veteran—Rights under employer's pension plan.—Respondent, who left employment with petitioner for military service but who returned

MILITARY SELECTIVE SERVICE ACT—Continued.
after completion of such service and continued in employment until his retirement, is entitled under § 9 of Act, which requires an employer to rehire a returning veteran without loss of seniority, to credit toward his pension under petitioner's pension plan for his period of military service. Alabama Power Co. v. Davis, p. 581.

MINORS' ADMISSION AND COMMITMENT TO MENTAL INSTITUTIONS. See **Class Actions; Mootness.**

MISSISSIPPI. See **Constitutional Law,** V, 1.

MOOTNESS. See also **Class Actions.**

Repeal and replacement of challenged statutory provisions.—Enactment of 1976 Act, which completely repealed and replaced, vis-à-vis named appellees, challenged provisions of 1966 Pennsylvania statute governing voluntary admission and commitment to state mental health institutions of persons aged 18 or younger, clearly moots claims of named appellees, who are treated as adults totally free to leave hospital and who cannot be forced to return unless they consent to do so. Kremens v. Bartley, p. 119.

MOTOR CARRIERS. See **Civil Rights Act of 1964,** 2–7.

MOTOR VEHICLES. See **Constitutional Law,** III, 10.

MURDER OF POLICE OFFICER. See **Constitutional Law,** IV.

NARCOTICS. See **Constitutional Law,** IX; **Criminal Law.**

NAVY. See **Armed Forces.**

NEGROES. See **Civil Rights Act of 1964,** 3–7.

NEW JERSEY. See **Constitutional Law,** II.

NEW YORK. See **Constitutional Law,** II; III, 1–3, 7–9; VII, 3; VIII, 7; **Standing to Sue.**

NEXUS BETWEEN POSSESSION OF FIREARMS AND COMMERCE. See **Omnibus Crime Control and Safe Streets Act of 1968.**

1950 ORGANIC ACT OF GUAM. See **Jurisdiction.**

1975 EXECUTIVE SALARY COST-OF-LIVING ADJUSTMENT ACT. See **Procedure,** 1.

NONPRESCRIPTION CONTRACEPTIVES. See **Constitutional Law,** III, 1–3.

NORTH CAROLINA. See **Habeas Corpus.**

NOTICE AS TO PROHIBITED OBSCENE MATERIALS. See **Constitutional Law,** III, 11.

OBSCENITY. See also **Constitutional Law**, III, 4, 11; VI; VIII, 3, 4, 8; **Federal-State Relations**, 5; **Procedure**, 2.

Sado-masochistic materials—Standards for determining obscenity.—Sado-masochistic materials in question were properly found by courts below to be obscene under Illinois statute forbidding sale of obscene matter, which statute conforms to standards of *Miller* v. *California*, 413 U. S. 15, except that it retains stricter "redeeming social value" obscenity criterion announced in *Memoirs* v. *Massachusetts*, 383 U. S. 413. Ward v. Illinois, p. 767.

OHIO. See **Constitutional Law**, V, 2; **Federal-State Relations**, 1, 6.

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968.

Felon's possession of firearm—Required nexus between possession and commerce.—In a prosecution for possession of a firearm in violation of provision of Title VII of Act, 18 U. S. C. App. § 1202 (a), making it a crime for a convicted felon to possess "in commerce or affecting commerce" any firearm, proof that possessed firearm previously traveled at some time in interstate commerce is sufficient to satisfy statutorily required nexus between possession and commerce. This is so, where, as in this case, firearm in question traveled in interstate commerce before accused became a convicted felon; nexus need not be "contemporaneous" with possession. Scarborough v. United States, p. 563.

ONE PERSON, ONE VOTE. See **Constitutional Law**, V, 1.

OPENING OF INTERNATIONAL MAIL FOR CUSTOMS INSPECTION. See **Constitutional Law**, VIII, 5; IX; **Criminal Law.**

ORDINANCES PROHIBITING REAL ESTATE SIGNS. See **Constitutional Law**, VIII, 6.

OVERBREADTH. See **Constitutional Law**, VIII, 3, 8.

OVER-THE-ROAD DRIVERS. See **Civil Rights Act of 1964**, 2–7.

PANDERING. See **Constitutional Law**, VI; VIII, 4.

PASS-ON THEORY IN ANTITRUST TREBLE-DAMAGES ACTIONS. See **Antitrust Acts.**

PATENT OFFENSIVENESS. See **Federal-State Relations**, 5.

PATTERN OR PRACTICE OF EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964**, 3–7.

PENNSYLVANIA. See **Class Action**; **Mootness.**

PENSION RIGHTS OF RETURNING VETERANS. See **Military Selective Service Act.**

PERJURY BEFORE GRAND JURY. See **Constitutional Law, VII, 4.**

PLEA BARGAINING. See **Habeas Corpus.**

POLICE OFFICERS' LIABILITY FOR USING DEADLY FORCE IN APPREHENDING FELON. See **Constitutional Law, I.**

POLITICAL PARTY OFFICERS. See **Constitutional Law, VII, 3.**

PORT AUTHORITY OF NEW YORK AND NEW JERSEY. See **Constitutional Law, II.**

POSSESSION OF FIREARMS. See **Omnibus Crime Control and Safe Streets Act of 1968.**

POSTAL REGULATIONS AUTHORIZING CUSTOMS INSPECTION. See **Criminal Law.**

POSTAL REVENUE AND FEDERAL SALARY ACT OF 1967. See **Procedure, 1.**

POTENTIAL CRIMINAL DEFENDANTS. See **Constitutional Law, VII, 2.**

PRE-EMPTION. See **Federal-State Relations, 1, 2, 6.**

PREINDICTMENT DELAY. See **Constitutional Law, III, 6.**

PRICE FIXING. See **Antitrust Acts.**

PRIOR HEARINGS ON REVOCATION OF DRIVERS' LICENSES. See **Constitutional Law, III, 10.**

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law, VII, 2–4.**

PROCEDURE. See also **Civil Rights Act of 1964, 2; Class Actions; Judicial Review.**

1. *Challenge to federal statute—Dismissal—Effect of intervening amendment.*—District Court's judgment dismissing complaint challenging constitutionality of certain provisions of Postal Revenue and Federal Salary Act of 1967 and 1975 Executive Salary Cost-of-Living Adjustment Act, is vacated and case is remanded for further consideration in light of intervening amendment. Pressler v. Blumenthal, p. 169.

2. *Federal obscenity prosecution—Voir dire examination—Community standards.*—In prosecution of petitioner for mailing obscene materials in violation of 18 U. S. C. § 1461, District Court did not abuse its discretion in refusing to ask questions tendered by petitioner for *voir dire* about jurors' understanding of community standards, which were no more appropriate than a request for a description of meaning of "reasonableness" would have been. Smith v. United States, p. 291.

PROHIBITION AGAINST ADVERTISEMENT OR DISTRIBUTION OF CONTRACEPTIVES. See Constitutional Law, III, 1–3; VIII, 7; Standing to Sue.

PROHIBITION OF REAL ESTATE SIGNS. See Constitutional Law, VIII, 6.

PUBLIC EMPLOYEES. See Constitutional Law, VIII, 1, 2.

PUBLIC SCHOOL TEACHERS. See Constitutional Law, VIII, 1, 2.

PUBLIC SECTOR UNIONS. See Constitutional Law, VIII, 1, 2.

RACIAL DISCRIMINATION. See Civil Rights Act of 1964, 2–7.

RAIL PASSENGER TRANSPORTATION. See Constitutional Law, II.

RATIONAL RELATION TO LEGITIMATE STATE INTEREST. See Constitutional Law, V, 2.

REAL ESTATE "FOR SALE" AND "SOLD" SIGNS. See Constitutional Law, VIII, 6.

REAPPORTIONMENT PLANS. See Constitutional Law, V, 1.

RE-ENLISTMENT BONUSES. See Armed Forces.

REFUSAL TO WAIVE PRIVILEGE AGAINST SELF-INCRIMNATION. See Constitutional Law, VII, 3.

REGULATIONS UNDER CLEAN AIR ACT. See Judicial Review.

REHIRING OF RETURNING VETERANS. See Military Selective Service Act.

REMEDIES AGAINST EMPLOYMENT DISCRIMINATION. See Civil Rights Act of 1964, 3–7.

REMOVAL OF FOSTER CHILDREN FROM FOSTER HOMES. See Constitutional Law, III, 7, 8.

REMOVAL OF POLITICAL PARTY OFFICERS FOR REFUSAL TO WAIVE SELF-INCRIMINATION PRIVILEGE. See Constitutional Law, VII, 3.

RETRIALS. See Constitutional Law, VII, 1.

RETROACTIVE REPEAL OF BISTATE COVENANTS. See Constitutional Law, II.

RETROACTIVE SENIORITY. See Civil Rights Act of 1964, 3–7.

RETURNING VETERANS' PENSION RIGHTS. See Military Selective Service Act.

REVOCATION OF DRIVERS' LICENSES. See Constitutional Law, III, 10.

SADO-MASOCHISTIC MATERIALS. See **Constitutional Law**, III, 11; VIII, 3–8; **Obscenity.**

SALE OF CONTRACEPTIVES. See **Constitutional Law**, III, 1–3; **Standing to Sue.**

SEARCHES AND SEIZURES. See **Constitutional Law**, IX; **Criminal Law.**

SECOND-DEGREE MURDER. See **Constitutional Law**, III, 9.

SELF-INCRIMINATION. See **Constitutional Law**, VII, 2–4.

SENIORITY RIGHTS OF RETURNING VETERANS. See **Military Selective Service Act.**

SENIORITY SYSTEMS. See **Civil Rights Act of 1964.**

SERVICE CHARGES UNDER AGENCY-SHOP AGREEMENTS. See **Constitutional Law**, VIII, 1, 2.

SERVICE-CONNECTED INJURIES. See **Federal Tort Claims Act.**

SEX DISCRIMINATION. See **Civil Rights Act of 1964**, 1.

SHERMAN ACT. See **Antitrust Acts.**

SIXTH AMENDMENT. See **Constitutional Law**, III, 6.

SOCIAL SECURITY ACT. See **Federal-State Relations**, 1, 6.

"SOLD" SIGNS. See **Constitutional Law**, VIII, 6.

SPANISH-SURNAMED AMERICANS. See **Civil Rights Act of 1964.**

SPEEDY TRIAL CLAUSE. See **Constitutional Law**, III, 6.

STANDARDS FOR DETERMINING OBSCENITY. See **Constitutional Law**, VIII, 3, 8; **Obscenity.**

STANDING TO SUE.

Action challenging statute regulating distribution and advertisement of contraceptives.—Appellee Population Planning Associates, a corporation which makes mail-order sales of nonmedical contraceptive devices from its North Carolina offices and regularly advertises its products in New York periodicals and fills mail orders from New York residents without limiting availability of products to persons of any particular age, has requisite standing, not only in its own right but also on behalf of its potential customers, to maintain action challenging constitutionality of New York statute prohibiting distribution of contraceptives to minors under 16 and to persons over 16 except through licensed pharmacists, and prohibiting anyone, including licensed pharmacists, from advertising or displaying contraceptives, and therefore there is no occasion to decide standing of other appellees. Carey v. Population Services International, p. 678.

STATE MENTAL INSTITUTIONS. See **Class Actions; Mootness.**

STRIKES. See **Constitutional Law, V, 2; Federal-State Relations, 1, 6.**

SUPPRESSION OF EVIDENCE. See **Constitutional Law, VII, 2, 4.**

SUPREMACY CLAUSE. See **Federal-State Relations, 2**

SUPREME COURT. See also **Judicial Review.**

1. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Seventh Circuit, p. 950.
2. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Fifth Circuit, p. 961.

SUSPENSION OF DRIVERS' LICENSES. See **Constitutional Law, III, 10.**

TEACHERS. See **Constitutional Law, VIII, 1, 2.**

TERRITORIAL COURTS. See **Jurisdiction.**

THIRD-PARTY INDEMNITY CLAIMS AGAINST UNITED STATES. See **Federal Tort Claims Act.**

TRANSPORTATION CONTROL PLAN REGULATIONS. See **Judicial Review.**

TREBLE-DAMAGES ACTIONS. See **Antitrust Acts.**

TRUCKDRIVERS. See **Civil Rights Act of 1964, 2–7.**

UNEMPLOYMENT COMPENSATION. See **Constitutional Law, V, 2; Federal-State Relations, 1, 6.**

UNEMPLOYMENT DUE TO LABOR DISPUTE. See **Constitutional Law, V, 2; Federal-State Relations, 1, 6.**

UNIONS. See **Constitutional Law, VIII, 1, 2.**

UNITED STATES. See **Federal Tort Claims Act.**

UNITED STATES NAVY. See **Armed Forces.**

UNLAWFUL EMPLOYMENT PRACTICES. See **Civil Rights Act of 1964.**

VAGUENESS. See **Constitutional Law, III, 4, 11.**

VETERANS' BENEFITS ACT. See **Federal Tort Claims Act.**

VETERANS' PENSION RIGHTS. See **Military Selective Service Act.**

VINEYARD SOUND. See **Federal-State Relations, 3.**

VIRGINIA. See **Federal-State Relations, 2.**

VOIR DIRE. See **Procedure, 2.**

VOLUNTARY ADMISSION AND COMMITMENT OF MINORS TO MENTAL INSTITUTIONS. See **Class Actions; Mootness.**

WAIVER OF IMMUNITY AGAINST PROSECUTION. See **Constitutional Law,** VII, 3.

WARNINGS TO POTENTIAL CRIMINAL DEFENDANTS. See **Constitutional Law,** VII, 2.

WARRANTLESS SEARCHES. See **Constitutional Law,** IX.

WEAPONS. See **Omnibus Crime Control and Safe Streets Act of 1968.**

WITNESSES BEFORE GRAND JURY. See **Constitutional Law,** VII, 2–4.

WORDS AND PHRASES.

"Final decision." 28 U. S. C. § 1291. Abney v. United States, p. 651.

ZONING. See **Constitutional Law,** III, 5.

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